

EDITOR'S NOTE

**THE FOLLOWING PAGES WERE POOR HARD COPY
AT THE TIME OF FILMING. IF AND WHEN A
BETTER COPY CAN BE OBTAINED, A NEW FICHE
WILL BE ISSUED.**

(SHOW)

PROCEEDINGS AND ORDERS

DATE: 110785

CASE NBR 84-1-01731 CSX
SHORT TITLE Lorain Journal Co., et al.
VERSUS Milkovich, Michael

DOCKETED: May 6 1985

Date

Proceedings and Orders

May 6 1985	Petition for writ of certiorari filed.
May 10 1985	Letter from petitioner in compliance with Rule 28.1 filed.
May 29 1985	Order extending time to file response to petition until July 8, 1985.
Jun 7 1985	Motion of Ohio Newspaper Association for leave to file a brief as amicus curiae filed.
Jul 8 1985	Brief of respondent Michael Milkovich, Sr. in opposition filed.
Jul 10 1985	DISTRIBUTED. September 30, 1985
Oct 7 1985	REDISTRIBUTED. October 11, 1985
Oct 15 1985	Motion of Ohio Newspaper Association for leave to file a brief as amicus curiae GRANTED.
Oct 15 1985	REDISTRIBUTED. October 18, 1985
Oct 21 1985	REDISTRIBUTED. November 1, 1985

CONTINUE {

PROCEEDINGS AND ORDERS

DATE: 110785

CASE NBR 84-1-01731 CSX
SHORT TITLE Lorain Journal Co., et al.
VERSUS Milkovich, Michael

DOCKETED: May 6 1985

Date

Proceedings and Orders

Nov 4 1985	Petition DENIED. Dissenting opinion by Justice Brennan with whom Justice Marshall joins. (Detached opinion.) *****
------------	--

84-1731①

Office-Supreme Court, U.S.
FILED

MAY 6 1985

ALEXANDER L. STEVAS,
CLERK

No.

In the Supreme Court of the United States

October Term, 1984

THE LORAIN JOURNAL CO., THE NEWS-HERALD,
AND J. THEODORE DIADIUN,
Petitioners,

vs.

MICHAEL MILKOVICH, SR.,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of the State of Ohio**

DAVID L. HERZER
Counsel of Record
1144 West Erie Avenue
Lorain, Ohio 44052
(216) 244-5268
Attorney for Petitioners

Of Counsel

RICHARD D. PANZA
RICHARD A. NAEGELE
MARK I. BOGART
RICHARD A. HORVITZ
WICKENS, HERZER & PANZA Co., L.P.A.
1144 West Erie Avenue
Lorain, Ohio 44052

QUESTIONS PRESENTED

1. Did the Ohio Supreme Court violate the First and Fourteenth Amendments to the United States Constitution by holding that *Curtis Publishing Co. v. Butts* was overruled by *Gertz v. Robert Welch, Inc.* and thereby that a nationally active and nationally acclaimed high school wrestling coach is not a public figure?

2. Did the Ohio Supreme Court violate the First and Fourteenth Amendments to the United States Constitution by holding that a publicly employed high school teacher and wrestling coach, who is responsible for the education of high school students and athletes, is not a public official within the meaning of *Rosenblatt v. Baer*?

3. Is the First Amendment privilege covering expressions of opinion abridged where federal and state courts in Ohio are bound by conflicting precedents in determining the scope of protected opinion?

TABLE OF CONTENTS

Questions Presented	I
Table of Authorities	V
Opinions Below	1
Jurisdiction	3
Constitutional Provisions	3
Statement of the Case	4
The Facts	4
The Proceedings	7
Reasons for Granting Petitioners' Writ	10
I. The Ohio Supreme Court Erroneously Held That <i>Gertz v. Robert Welch, Inc.</i> Overruled <i>Curtis Publishing Co. v. Butts</i> As to the Definition of Public Figures for Purposes of the <i>New York Times</i> Privilege	10
II. The Ohio Supreme Court's Determination That a High School Wrestling Coach and Teacher, Employed by a City Public School System, Is Not a Public Official Creates a Conflict Between States in the Interpretation of <i>Rosenblatt v. Baer</i>	16
III. The Decision of the Ohio Supreme Court Regarding Protected Opinion Conflicts With Prior Holdings of the United States Sixth Circuit and Establishes Different and Conflicting Standards for Determining Constitutionally Protected Opinion by Federal and State Courts in Ohio	18
IV. The Determination of the Ohio Supreme Court That Respondent Is Not a Public Figure or	

Public Official and That the Article Is Not Constitutionally Protected Opinion Is a Final Judgment and the Case Is in All Respects Ripe for Review	22
--	----

Conclusion	25
------------------	----

Appendix:

APPENDIX CONTENTS

OPINION BY THE COURT WHOSE DECISION IS SOUGHT TO BE REVIEWED.

1. Opinion of the Supreme Court of the State of Ohio	A1
--	----

ALL OTHER OPINIONS AND ORDERS RENDERED BY COURTS IN THIS CASE.

Supreme Court of the United States

2. Dissent of Mr. Justice Brennan in the Denial of Petitioners' First Request for Certiorari	A18
--	-----

Courts of the State of Ohio (In Chronological Order)

3. Judgment Entry in the Court of Common Pleas, Lake County, Ohio, Granting in Part and Denying in Part Defendants' Motion for Summary Judgment	A24
4. Journal Entry of the Court of Common Pleas, Lake County, Ohio, Granting Defendants' Motion for a Directed Verdict	A26
5. Judgment Entry of the Court of Appeals of Ohio, Eleventh District, County of Lake	A28
6. Opinion of the Court of Appeals of Ohio, Eleventh District, County of Lake	A30
7. Judgment Entry Errata	A42

IV

8. Order of the Supreme Court of Ohio Dismissing the Appeal A43
9. Order of the Supreme Court of Ohio Overruling the Motion for an Order Directing the Court of Appeals to Certify Its Record A44
10. Order of the Supreme Court of Ohio Denying Rehearing A45
11. Opinion of the Court of Common Pleas, Lake County, Ohio A46
12. Judgment Entry of the Court of Common Pleas, Lake County, Ohio, Granting Defendants' Motion for Summary Judgment A59
13. Opinion of the Court of Appeals of Ohio, Eleventh District, County of Lake A61
14. Judgment Entry of the Court of Appeals of Ohio, Eleventh District, County of Lake A70

COPIES OF THE OHIO SUPREME COURT'S JUDGMENT AND ORDER ON REHEARING.

15. Judgment Entry of the Supreme Court of the State of Ohio A72
16. Order of the Supreme Court of the State of Ohio Denying Petitioners' Motion for Rehearing A73

ALL OTHER MATERIALS

17. The Article in Issue A75

V

TABLE OF AUTHORITIES

Cases

- Bose Corporation v. Consumers Union of U.S., Inc.*,
U.S.,, 104 S. Ct. 1949 (1984) 18
- Cianci v. New Times Publishing Co.*, 639 F.2d 54 (2d Cir. 1980) 19
- Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) 22, 23, 24
- Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967) 8, 10, 11, 12, 13, 14, 15, 16
- Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) 10, 12, 13, 14, 15, 16, 18
- Hotchner v. Castillo-Puche*, 551 F.2d 910 (2d Cir. 1977),
cert. denied, 434 U.S. 834 (1977) 21
- Hutchinson v. Proxmire*, 443 U.S. 111 (1979) 14
- Johnston v. Corinthian Television Corp.*, 583 P.2d 1101 (Okla. 1978) 17
- Lauderback v. American Broadcasting Companies*, 741 F.2d 193 (8th Cir. 1984), cert. denied, U.S.
....., 105 S. Ct. 961 (1985) 20, 21
- Lewis v. Time, Inc.*, 710 F.2d 549 (9th Cir. 1983) 21
- The Lorain Journal Company et al. v. Milkovich*, 449 U.S. 966 (1980), denying cert. (Brennan, J., dissenting) 2, 8, 23
- Miami Herald Publishing v. Tornillo*, 418 U.S. 241 (1974) 23
- Milkovich v. Lorain Journal Co.*, 65 Ohio App. 2d 143, 416 N.E.2d 662 (1979) 1, 8
- Milkovich v. The News Herald et al.*, 15 Ohio St. 3d 292, 473 N.E.2d 1191 (1984) 2, 11, 12, 14, 15, 17, 18, 19

<i>Mills v. Alabama</i> , 384 U.S. 214 (1966)	22
<i>New York Times Co. v. Sullivan</i> , 376 U.S. 254 (1964)	10, 11, 14, 18
<i>Ollman v. Evans</i> , 750 F.2d 970 (D.C. Cir. 1984)	21
<i>Orr v. Argus-Press Company</i> , 586 F.2d 1108 (6th Cir. 1978), cert. denied, 440 U.S. 960 (1979)	19, 20, 21
<i>Pease v. Telegraph Publishing Co., Inc.</i> , 121 N.H. 62, 426 A.2d 463 (1981)	21
<i>Radio Station WOW, Inc. v. Johnson</i> , 326 U.S. 120 (1945)	24
<i>Rosenblatt v. Baer</i> , 383 U.S. 75 (1966)	16, 17, 18
<i>Rosenbloom v. Metromedia, Inc.</i> , 403 U.S. 29 (1971)	12, 13
<i>Time, Inc. v. Firestone</i> , 424 U.S. 448 (1976)	14, 16
<i>Wolston v. Reader's Digest Association</i> , 443 U.S. 157 (1979)	14

Constitutions

U.S. Constitution	
Amendment I	3
Amendment XIV	3

Other Authorities

Judicial Code, 28 U.S.C. §1257 (1976)	3, 22, 24
RESTATEMENT (SECOND) OF TORTS (1977)	19, 21

No.

In the Supreme Court of the United States

October Term, 1984

THE LORAIN JOURNAL CO., THE NEWS-HERALD,
AND J. THEODORE DIADIUN,

Petitioners,

vs.

MICHAEL MILKOVICH, SR.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI To the Supreme Court of the State of Ohio

OPINIONS BELOW

The journal entry and opinion of the Court of Common Pleas, Lake County, Ohio, granting the motion of defendants ("Petitioners") to dismiss at the close of plaintiff's case, is unreported and is set forth in the appendix at p. A24. The judgment entry and opinion of the Court of Appeals of Ohio, Eleventh District, County of Lake, reversing the determination of the Court of Common Pleas, are set forth in the appendix at p. A28; this opinion is reported at 65 Ohio App. 2d 143, 416 N.E.2d 662 (1979). The orders of the Supreme Court of Ohio dismissing defendants' appeal, overruling a motion for certification and denying rehearing with respect thereto are unreported and are set forth in the appendix at p. A43.

The denial of Petitioners' first petition for writ of certiorari from this Court is set forth in the appendix at p. A18 and was reported at 449 U.S. 966 (1980), Justice Brennan, dissenting.

The second journal entry and opinion of the Court of Common Pleas, Lake County, Ohio, granting defendants' second summary judgment motion, are unreported and are set forth in the appendix at p. A46. The second judgment entry and opinion of the Court of Appeals of Ohio, Eleventh District, County of Lake, affirming the determination of the Court of Common Pleas, are unreported and are set forth in the appendix at p. A61. The journal entry and opinion of the Supreme Court of Ohio, reversing the determinations of the Court of Appeals and Court of Common Pleas, are set forth in the appendix at pp. A1, A72, and are also reported at 15 Ohio St. 3d 292, 473 N.E.2d 1191 (1984).

JURISDICTION

1. On December 31, 1984, the Ohio Supreme Court reversed the decision of the Court of Appeals, Eleventh District, County of Lake (A72).

2. On February 6, 1985, the Ohio Supreme Court denied Petitioners' motion for rehearing (A73).

3. Jurisdiction to hear this writ of certiorari is conferred on this Court by 28 U.S.C. Section 1257(3) (1976).

CONSTITUTIONAL PROVISIONS

The First Amendment to the United States Constitution provides, in part:

"Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

The Fourteenth Amendment to the United States Constitution provides, in part:

"No State shall . . . deprive any person of life, liberty or property, without due process of law. . . ."

STATEMENT OF THE CASE

A. The Facts

1. This libel action arises from the publication of a certain article* ("Article") on January 8, 1975, by The News Herald, a newspaper located in Lake County, Ohio, and owned by The Lorain Journal Co., Petitioners herein. The Article was written by Petitioner, Ted Diadiun ("Diadiun"), a sportswriter and opinion columnist employed by The News Herald. The Article commented upon and expressed Diadiun's opinion regarding certain activities of Michael Milkovich ("Milkovich"), Respondent, in his capacity as a teacher and the wrestling coach of Maple Heights High School, located in Maple Heights, Ohio.

2. Milkovich was employed as a teacher by the Maple Heights Board of Education and was paid by public funds. The School Board also employed Milkovich as the Maple Heights High School Wrestling Coach.

3. By his own admission, Milkovich has actively and affirmatively sought to establish himself as one of America's outstanding coaches and a nationally acclaimed sports figure. He has continuously thrust himself into the public limelight by advertising his family in a public relations brochure as the "Nation's Outstanding Wrestling Family" (R. 809-811) and by openly promoting himself as "Ohio's Number One High School Coach" (R. 641) and as the "dean" of high school wrestling coaches (R. 987, 1235).

As a result of his public relations activities and the magnitude of his accomplishments, Milkovich has been

* Attached to this Petition in the Appendix at A75.

honored by civic groups, legislative bodies and sports organizations. At trial, Coach Milkovich summarized the pervasiveness of his accomplishments as follows:

- (a) Received 1977 National Coach of the Year Award, Portland, Oregon (R. 651, 652).
- (b) Received Congressional Record Citation (R. 588).
- (c) Received National Council of High School Coaches Award (R. 589, 650).
- (d) Inducted into the National Helms Hall of Fame (R. 649).
- (e) Received National Achievement Award by the Scholastic Wrestling News (R. 588).
- (f) Conducted wrestling clinics throughout the United States sponsored by State Associations and Coaches Organizations (R. 644, 646, 647).
- (g) Frequent speaker at Coaches Associations throughout United States (R. 630, 632).
- (h) Received United States Wrestling Federation Award (R. 588).
- (i) Honored with citation from Ohio Senate (R. 651).
- (j) Honored with citation from Ohio House of Representatives (R. 651).
- (k) Charter member, Ohio Coaches Hall of Fame (R. 649).
- (l) Continuously sought as a Speaker at educational institutions regarding wrestling and athletics (R. 631, 632).
- (m) Honored and cited by Council of City of Cleveland (R. 651).

- (n) Honored by City of Maple Heights: "Mike Milkovich Day" (R. 587, 588).
- (o) Past President, Ohio Coaches Association (R. 590).
- (p) Conducted wrestling school at Baldwin-Wallace College (R. 630).
- (q) No other coach in United States ever close to his record (R. 641).
- (r) Received Kent State University Hall of Fame Award (R. 589).
- (s) Honored with gifts, proclamations, and awards from the entire community upon his retirement (R. 637, 638).
- (t) Winner of ten (10) Ohio state team titles (R. 587).

4. The Article express Diadiun's opinion regarding Coach Milkovich's behavior and actions at three separate but related public events: (1) a high school wrestling meet between Maple Heights High School and Mentor High School held on February 9, 1974, at Maple Heights High School; (2) an administrative hearing before the Ohio High School Athletic Association (herein the "OHSAA") in Columbus, Ohio, on April 25, 1974; and (3) a trial in the Franklin County Common Pleas Court on November 8, 1974 (R. 787).

5. The precipitating event discussed in the Article was the February 9, 1974 wrestling meet at Maple Heights High School. A Maple Heights wrestler fouled his Mentor opponent who thereby was unable to continue (R. 22-26). Shortly after the referee awarded the match to the injured Mentor wrestler (R. 26), a riot ensued in the Maple Heights gymnasium; spectators erupted from the stands

(R. 31, 197); a Maple Heights wrestler ran from his team bench and attacked a Mentor wrestler (R. 28); and a brawling melee followed (R. 28, 185-186, 197). Four Mentor wrestlers were taken to the hospital for treatment of injuries suffered (R. 569). A movie camera was present at the match and captured the violence of the scene.

Diadiun witnessed the meet as a reporter who had followed Milkovich's coaching career since 1967 (R. 69-72). The Article relates Diadiun's opinion that Milkovich caused and orchestrated the riot by his wild gestures (R. 31-32) and his ranting from the side of the mat (R. 33). At trial, Diadiun testified that the Maple Heights crowd adored Milkovich and mimicked his gestures and that he had witnessed Milkovich control the emotions and behavior of the Maple Heights spectators on numerous other occasions (R. 69-72).

B. The Proceedings

1. The instant case has been in litigation before various courts for ten years at enormous cost to Petitioners. The Trial Court, Court of Appeals and Ohio Supreme Court have each reviewed the facts of the instant case twice. Only the Ohio Supreme Court held, by a four to three margin in its most recent review, that Milkovich is a private individual, rather than a public figure or public official.

2. On April 30, 1975, Milkovich filed a complaint with jury demand in the Common Pleas Court for Lake County, Ohio, against The News Herald and The Lorain Journal Co., as owner and publisher of The News Herald. The complaint was subsequently amended to add the Article's author, Diadiun, as a defendant.

Petitioners filed a motion for summary judgment and, on May 23, 1977, the trial court granted the motion in part and held that Milkovich is a "public figure" within the meaning of *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967). No appeal was taken from that order.

The action proceeded to trial by jury. After five days of trial and at the close of Respondent's evidence, the court granted Petitioners' motion for a directed verdict and dismissed the action.

3. Milkovich appealed the trial court's directed verdict to the Court of Appeals, Eleventh District, Lake County, Ohio, but did not appeal the trial court's previous order declaring that he was a "public figure". In an opinion dated December 3, 1979, the Court of Appeals held that the Article conflicted with a prior "judicial determination of the truth", reversed the trial court's directed verdict, and remanded the case for further proceedings. *Milkovich v. Lorain Journal Co.*, 65 Ohio App. 2d 143 (1979).

4. On December 27, 1979, Petitioners appealed the Court of Appeals decision to the Ohio Supreme Court. On March 20, 1980, the Ohio Supreme Court dismissed Petitioners' appeal on the basis that no substantial constitutional question existed. Petitioners' motion for rehearing was similarly denied on April 25, 1980.

5. Petitioners then sought a writ of certiorari from this Court on July 23, 1980, *Lorain Journal Co. v. Milkovich*, 449 U.S. 966 (1980). Although this Court denied certiorari, Justice Brennan wrote a dissenting opinion criticizing the Lake County Court of Appeals for its December 3, 1979 decision. In his dissent, Justice Brennan noted that "[t]he ruling that Milkovich is a public figure is unchallenged". *Id.* at 968.

6. Thereafter, this action was returned to the Lake County Common Pleas Court for further proceedings. On April 17, 1981, Petitioners filed a second motion for summary judgment with the trial court. The court affirmed the first trial court's decision that Milkovich is a public figure and further granted Petitioners' second motion for summary judgment dismissing the action.

7. On October 26, 1981, Milkovich appealed the trial court's decision to the Court of Appeals, Eleventh District, Lake County. In this appeal, Milkovich challenged for the first time his public figure status as initially determined by the trial court over four years earlier. In an opinion dated October 3, 1983, the Court of Appeals affirmed Milkovich's status as a public figure and upheld the trial court's issuance of summary judgment.

8. On November 30, 1983, Milkovich appealed the Lake County Court of Appeals decision to the Ohio Supreme Court. Although the Ohio Supreme Court had previously refused to hear Petitioners' earlier appeal, the court nevertheless granted Milkovich's petition for certiorari and motion to certify the record. In a decision dated December 31, 1984, the court reversed the Court of Appeals, held that Milkovich is neither a public figure nor a public official, and remanded the case to the trial court for further proceedings under a "negligence" standard.

9. Petitioners then filed, on January 9, 1985, a motion for rehearing for the reason that, *inter alia*, two of the four Ohio Supreme Court justices (Chief Justice Frank Celebrezze and his brother—then Justice James Celebrezze) voting in the majority were prejudiced against Petitioners because of prior, highly critical editorials regarding such justices published by The News Herald. Petitioners' motion for rehearing was denied on February 6, 1985.

REASONS FOR GRANTING PETITIONERS' WRIT

I. THE OHIO SUPREME COURT ERRONEOUSLY HELD THAT *GERTZ v. ROBERT WELCH, INC. OVERRULED CURTIS PUBLISHING CO. v. BUTTS* AS TO THE DEFINITION OF PUBLIC FIGURES FOR PURPOSES OF THE NEW YORK TIMES PRIVILEGE.

A. Coach Milkovich's status for purposes of the New York Times privilege is factually indistinguishable from the status of Athletic Director Butts in *Curtis Publishing Co. v. Butts*.

This Court held in *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), that a "well-known and respected figure in coaching ranks" was a public figure for purposes of the *New York Times** privilege and "attained that status by position alone." *Butts*, 388 U.S. at 154-155. Butts was the acting athletic director and former head football coach at the University of Georgia, a state university, although he was actually employed by the Georgia Athletic Association, a private corporation. *Butts*, 388 U.S. at 135.

In the instant matter, Coach Milkovich was at least as "well-known and respected in coaching ranks" as was Athletic Director Butts. Milkovich sought and attained a national prominence and respect within the athletic world which was unparalleled in high school coaching (R. 641). He was inducted into the National Helms Hall of Fame (R. 649); was given the National Coach of

**New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), requiring a libel plaintiff who qualifies as a public official or as a public figure pursuant to *Butts*, 388 U.S. 130 (1967), and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), to prove that the defamatory statement was published with "actual malice" (that is, with knowledge of falsity or reckless disregard of the truth).

the Year Award for 1977 in Portland, Oregon (R. 651-2); received the United States Wrestling Federation Award (R. 588); was the President of the Ohio Coaches Association (R. 590); received the National Council of High School Coaches Award (R. 589, 650); and was given the National Achievement Award by the Scholastic Wrestling News (A. 588). See *Milkovich v. The News Herald*, 15 Ohio St. 3d 292, 296 n. 1, 473 N.E.2d 1191 (1984).

Milkovich's prominence in coaching created a national recognition and respect outside of athletics. He was honored by the Ohio Senate (R. 651); by the Ohio House of Representatives (R. 651); and by the City of Cleveland, Ohio (R. 651). He was given a "Mike Milkovich Day" by the City of Maple Heights, Ohio (R. 587-88). He was even honored with citations in the Congressional Record (R. 588).

Thus, within the context of a public figure analysis under the *New York Times* privilege, the facts relevant to Coach Milkovich's status are exactly the same as the facts applicable to Athletic Director Butts' status. This Court's decision in *Butts* should thereby control the instant matter and Milkovich should be declared a public figure.

B. The Ohio Supreme Court erroneously determined that the definition of a "public figure" in *Butts* has been overruled and "redefined" by *Gertz v. Robert Welch, Inc.*

In its opinion, the Ohio Supreme Court acknowledged that, within the meaning of *Butts*, Milkovich qualifies as a "public figure" for purposes of the *New York Times* privilege:

We believe that if *Rosenbloom*** and *Butts* were the last statements made by the high court concerning the definition of a public figure or official, we would be compelled to agree with the courts below that *Milkovich* is a public figure, and that the *N.Y. Times* standard would be applicable to his claim for relief.

Milkovich, 15 Ohio St. 3d at 295 (emphasis added).

The highest Ohio court further held that the concept of a public figure in *Butts* has been superceded or overruled by this Court in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), which "redefined the meaning of a public figure", *Milkovich*, 15 Ohio St. 3d at 295, to the exclusion of nationally known sports figures like *Butts* and *Milkovich*:

Appellees submit, and the court of appeals agreed, that the *Butts* decision is quite similar to the case at bar in that both *Butts* and *Milkovich* attained pervasive notoriety in their respective communities as prominent sports personalities, and that, therefore, *Milkovich* must be held to be a public figure in the same manner at *Butts*.

We disagree, and find that such a determination by this court would require us to ignore the *redefinition of the public figure status as enunciated in Gertz and its progeny*.

Milkovich, 15 Ohio St. 3d at 296 (emphasis added).

***Rosenbloom v. Metromedia*, 403 U.S. 29 (1971). The Ohio Supreme Court's reference to *Rosenbloom* is confusing, since neither the Petitioners nor any of the lower courts in Ohio relied upon this case and since the case clearly involved only private individuals.

The Ohio Supreme Court's analysis of the *Gertz* decision as applied to *Butts* is erroneous. Although *Gertz* pointedly overruled the plurality opinion in *Rosenbloom* (which had adopted a subject matter test to determine public figure status), this Court at the same time expressly reaffirmed *Butts*:

... the Court has concluded that the protection of the *New York Times* privilege should be available to publishers and broadcasters of defamatory falsehood concerning public officials and public figures. *New York Times Co. v. Sullivan*, *supra*; *Curtis Publishing Co. v. Butts*, *supra*. We think that these decisions are correct. . . .

Gertz, 418 U.S. at 343 (emphasis added).

If *Gertz* did not overrule *Butts* as to the determination of a "public figure", then the underlying premise of the Ohio Supreme Court's public figure holding crumbles and this Court should remove the pervasive chilling effects of this erroneous decision upon freedom of the press in Ohio. If *Gertz* did overrule *Butts*, then this Court should afford all lower federal and state courts with a clear pronouncement that *Butts* is no longer good law in that respect. In the interim, Ohio trial and appellate courts are precluded from relying upon *Butts* to ascertain public figure status.

C. The Ohio Supreme Court further erroneously ruled that, because the *Butts* definition of public figures is no longer good law, *Milkovich*'s status under the *New York Times* privilege is controlled by *Time, Inc. v. Firestone*.

The Ohio Supreme Court believed that this Court would no longer hold *Butts* to be a public figure under

the Gertz standards as applied by *Time, Inc. v. Firestone*, 424 U.S. 448 (1976), by *Hutchinson v. Proxmire*, 443 U.S. 111 (1979), and by *Wolston v. Reader's Digest Association, Inc.*, 443 U.S. 157 (1979). *Milkovich*, 15 Ohio St. 3d at 296. The implausible result of the Ohio Supreme Court's reasoning is that Coach Milkovich, nationally acclaimed and influential both within and without the athletic world, is closer in status to Mary Alice Firestone (in *Firestone*) than to Athletic Director Butts (in *Butts*) for purposes of the *New York Times* privilege:

Given the application of the public figure definition since Gertz, we find appellant's status to be akin to the status of the plaintiff in Firestone, supra, rather than the status of the athletic director in Butts.

Milkovich, 15 Ohio St. 3d at 297 (emphasis added).

The resemblance of Milkovich to Mary Alice Firestone pales by comparison to the similarity of Milkovich to Butts. Mrs. Firestone's only "public" involvement was her marriage into a wealthy family and her subsequent resort to the courts for divorce proceedings. *Firestone*, 424 U.S. at 453-55. Unlike Mrs. Firestone, Coach Milkovich's fame, respect and influence pervaded the athletic society (similar to, and perhaps even to a greater degree than, Butts) and overflowed to the general community. Likewise, Coach Milkovich's "public" involvement was far closer to that of Athletic Director Butts than to the scientist who merely received federal research grants in *Hutchinson* and to the plaintiff in *Wolston* whose failure to respond to a grand jury subpoena and his subsequent citation for contempt constituted his only public involvement.

More importantly, Milkovich meets one or both alternatives of the Gertz public figure definition:

Those who by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention, are properly classed as public figures

Gertz, 418 U.S. at 342.

First, as previously discussed, Coach Milkovich (like Athletic Director Butts) has "assumed roles of especial prominence in the affairs of society", *Gertz*, 418 U.S. at 345, both in and out of athletics. Indeed, he testified at trial that he became nationally known and respected as the "dean" of high school wrestling coaches (R. 987, 1235) and that he knew of no other coach in the United States who approached his coaching record (R. 641).

Second, Milkovich has done much more than merely "assume" his role of prominence. By his own admission, he has actively and concertedly thrust himself into matters of public interest and thereby attained pervasive influence, respect and acclaim (R. 809-813; 641-644). He advertised himself and his sons (in a brochure admitted into evidence) as "The Nation's Outstanding Wrestling Family" (R. 641-2; 729-30). He taught at national wrestling clinics (R. 644, 646, 647) and gave lectures at national seminars and conferences and at schools throughout the country (R. 630-632). Furthermore, regarding the specific controversy described in the Article, Milkovich affirmatively thrust himself into both the creation and resolution of the matter (R. 27, 31-33).

Thus, in the language of *Gertz*, Milkovich "invite[d] attention and comment." *Gertz*, 418 U.S. at 345. He is, therefore, a public figure under both *Butts* and *Gertz*.

Based upon its erroneous application of *Gertz* to *Butts*, the Ohio Supreme Court was forced to conclude incorrectly that Coach Milkovich, nationally acclaimed and ceaselessly active in public affairs, was more "akin" in status to Mary Alice Firestone, whose prominence and public involvement were limited at best, than to Athletic Director Butts. Without this interpretation of *Gertz*, the highest Ohio court, by its own admission, "... would be compelled to agree with the courts below that Milkovich is a public figure. . . ." *Milkovich*, 15 Ohio St. 3d at 295. This confusion in the application of *Gertz*, *Butts* and *Firestone* to defamation actions brought in Ohio courts must be clarified by this Supreme Court.

II. THE OHIO SUPREME COURT'S DETERMINATION THAT A HIGH SCHOOL WRESTLING COACH AND TEACHER, EMPLOYED BY A CITY PUBLIC SCHOOL SYSTEM, IS NOT A PUBLIC OFFICIAL CREATES A CONFLICT BETWEEN STATES IN THE INTERPRETATION OF *ROSENBLATT v. BAER*.

A. Within the standards enunciated in *Rosenblatt v. Baer*, *Milkovich* qualifies as a public official.

In *Rosenblatt v. Baer*, 383 U.S. 75 (1966), this Court held that public officials are those government employees who have "substantial responsibility for or control over the conduct of governmental affairs." *Id.* at 85. *Milkovich* was employed as a teacher and coach by a state governmental agency, the Maple Heights Board of Education, and was charged with the rather significant responsibility for and control over educating and developing young, impressionable athletes participating on the Maple Heights High School Wrestling Team. If public education is indeed a governmental function, *Milkovich* thereby held "...

a position in government [with] such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it. . . ." *Id.* at 86.

Without analysis, the Ohio Supreme Court simply announced that it was "unpersuaded that the *Rosenblatt* definition of a public official was intended to encompass a person like appellant. . . .", *Milkovich*, 15 Ohio St. 3d at 297, even though *Milkovich* was undeniably a public employee entrusted with the important governmental function of education.

B. The Ohio Supreme Court's determination that a high school wrestling coach is not a public official directly conflicts with a determination of the Oklahoma Supreme Court on the identical issue.

In *Johnston v. Corinthian Television Corp.*, 583 P.2d 1101 (Okla. 1978), the Oklahoma Supreme Court ruled that a grade school wrestling coach was a public official. The Oklahoma Supreme Court analyzed the definition of "public official" in *Rosenblatt* and expressly determined that even a grade school coach's performance of the governmental function of public education is so important that the public has a substantial interest in evaluating the coach's qualifications and performance. *Johnston*, 583 P.2d at 1103.

The Ohio Supreme Court expressly rejected the Oklahoma court's decision and, again without analysis, stated that acceptance of the Oklahoma Supreme Court's application of *Rosenblatt* "... would unduly exaggerate the

public official designation beyond its original intendment." *Milkovich*, 15 Ohio St. 3d at 297.

This Court should eliminate the confusion in applying the *Rosenblatt* standards and cure the conflict between the two state Supreme Courts. For purposes of the *New York Times* privilege, a person should qualify or not qualify as a public official irrespective of the state in which the defamation action is brought. See *Rosenblatt*, 383 U.S. at 84.

III. THE DECISION OF THE OHIO SUPREME COURT REGARDING PROTECTED OPINION CONFLICTS WITH PRIOR HOLDINGS OF THE UNITED STATES SIXTH CIRCUIT AND ESTABLISHES DIFFERENT AND CONFLICTING STANDARDS FOR DETERMINING CONSTITUTIONALLY PROTECTED OPINION BY FEDERAL AND STATE COURTS IN OHIO.

This Court stated in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), that "[u]nder the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." *Id.* at 339-40. Citing *Gertz* with approval, this Court recently noted that opinions are shielded by "the majestic protection of the First Amendment." *Bose Corporation v. Consumers Union of U.S., Inc.*, U.S., 104 S. Ct. 1949, 1961 (1984). Thus, since *Gertz*, it has been a firmly established principle of federal law that expressions of opinion are constitutionally protected.

A. The Ohio Supreme Court's ruling on constitutionally protected opinion conflicts with prior rulings of the Sixth Circuit Court of Appeals.

In *Orr v. Argus-Press Company*, 586 F.2d 1108 (6th Cir., 1978), *cert. denied*, 440 U.S. 960 (1979), the Sixth Circuit accepted the position of the RESTATEMENT (SECOND) OF TORTS, Section 566, that a statement of opinion "is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion" and held that allegations of "fraud" and "swindling" against a land developer were protected opinion. *Orr*, 586 F.2d at 1114-15. Justice Holmes, in his dissent from the Ohio Supreme Court's majority opinion in the instant case, noted that the trial and appellate courts below properly applied the opinion test prescribed by the RESTATEMENT and the Sixth Circuit in *Orr*. *Milkovich v. The News-Herald*, 15 Ohio St. 3d 292, 300 (1984) (Holmes, J., dissenting).

In addressing the opinion issue in the instant case, the Ohio Supreme Court pointedly states that it declines to establish a rule for determining what constitutes protected opinion but holds that, whatever such rule may be, the Article in question does not qualify. *Milkovich*, 15 Ohio St. 3d at 298. Moreover, the Ohio Supreme Court does not accept the holding in *Orr* but, rather, states that it is "persuaded" by the holding of the Second Circuit in *Cianci v. New Times Publishing Co.*, 639 F.2d 54, 64 (2d Cir. 1980), that accusations of criminal activity cannot constitute protected opinion. *Milkovich*, 15 Ohio St. 3d at 299.

By its adoption of *Cianci*, the Ohio Supreme Court has chosen to follow the Second Circuit rather than its own Sixth Circuit in determining questions of constitution-

ally protected opinion. The Ohio Supreme Court has thereby created a conflict within its own state borders with respect to federal and state court determinations of protected opinion.

B. The conflict between the Ohio Supreme Court and the Sixth Circuit Court of Appeals creates different standards of review for federal and state courts in Ohio on the opinion issue.

The Sixth Circuit Court of Appeals in *Orr* notes that state law libel issues are "subsumed in and altered by constitutional holdings." One such constitutional law issue is whether "defamatory words are protected as statements of opinion". *Orr*, 586 F.2d at 1114. Therefore, it may be assumed that the Sixth Circuit will neither alter nor reverse its prior holdings on constitutionally protected opinion in order to follow the Ohio Supreme Court's ruling in the instant case. Since Ohio is within the federal jurisdiction of the Sixth Circuit, federal and state courts in Ohio will follow different and conflicting standards in applying the constitutional opinion privilege. Henceforth, the determination of whether a statement constitutes protected opinion in Ohio will turn upon whether a federal or a state court is deciding the issue.

After the decision of the Sixth Circuit in *Orr*, many other Federal Circuit Courts of Appeals have held that a conclusion drawn from facts disclosed with reasonable completeness and accuracy is a constitutionally privileged statement of opinion. In *Lauderback v. American Broadcasting Companies*, 741 F.2d 193 (8th Cir. 1984), cert. denied, U.S., 105 S. Ct. 961 (1985), the Eighth Circuit held that allegations that an insurance agent was a "crook" and "liar" and that he

engaged in activities that were "rotten", "unethical", and "sometimes illegal" were protected statements of opinion, since the underlying factual bases for such opinions were fully disclosed. *Id.* at 197. In *Lewis v. Time, Inc.*, 710 F.2d 549 (9th Cir. 1983), the Ninth Circuit held that accusations implying that an attorney was unreliable and disreputable were protected statements of opinion. See also *Ollman v. Evans*, 750 F.2d 970, 1022-23 (D.C. Cir. 1984) (Robinson, J., dissenting in part); and *Hotchner v. Castillo-Puche*, 551 F.2d 910 (2d Cir. 1977), cert. denied, 434 U.S. 834 (1977).

Similarly, the Supreme Court of New Hampshire adopted the RESTATEMENT criteria for determining constitutionally protected opinion in *Pease v. Telegraph Publishing Co., Inc.*, 121 N.H. 62, 426 A.2d 463 (1981). In the instant case, the trial and appellate courts below relied upon the rulings and analyses of both *Pease* and *Orr* in reaching their conclusions that the Article constituted protected opinion.

As indicated above, the RESTATEMENT (SECOND) OF TORTS, Section 566 test for determining protected opinion has been cited with approval by the Supreme Court of New Hampshire and at least five United States Circuit Courts of Appeals including the Sixth Circuit, which has jurisdiction in Ohio. Since the Ohio Supreme Court rejects such standard in the instant case, a statement constituting protected opinion in federal courts in Ohio would not be considered to be protected opinion in state courts in Ohio. The conflict between the federal and state courts in Ohio can only be resolved if this Court grants certiorari to review the instant case.

IV. THE DETERMINATION OF THE OHIO SUPREME COURT THAT RESPONDENT IS NOT A PUBLIC FIGURE OR PUBLIC OFFICIAL AND THAT THE ARTICLE IS NOT CONSTITUTIONALLY PROTECTED OPINION IS A FINAL JUDGMENT AND THE CASE IS IN ALL RESPECTS RIPE FOR REVIEW.

The decision of the Ohio Supreme Court overruling the holdings of the trial and appellate courts that Milkovich is a public figure and that the subject Article constitutes protected opinion under the First Amendment is a final judgment for purposes of 28 U.S.C. Section 1257 (1976).

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975), enumerated four categories of cases in which this Court has treated a decision on a federal issue by a state court as a final judgment and has taken jurisdiction without awaiting the completion of additional proceedings in lower state courts. *Id.* at 477. The instant case fits within the fourth category under which both a federal issue "has been finally determined by the state courts for purposes of state litigation" and "a refusal immediately to review the state-court decision might seriously erode federal policy." *Id.* at 483.

In the instant case, the federal issues of constitutionally protected opinion and public figure/public official status have been finally decided by the Ohio Supreme Court and will remain in effect notwithstanding the results at a third trial. Forcing Petitioners to retry the instant case under the private figure "negligence" standard, as ordered by the Ohio Supreme Court, would "result in a completely unnecessary waste of time and energy." *Mills v. Alabama*, 384 U.S. 214, 217 (1966). The policy of judicial economy expressed by this Court in *Mills v. Ala-*

bama is particularly applicable to the instant case which has been in litigation for ten years at immense costs to Petitioners and is before this Court on a petition for a writ of certiorari for the second time.

In *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), a case categorized in *Cox* as fitting within the fourth category, the Florida Supreme Court had sustained the constitutionality of a mandatory editorial reply statute and remanded the case to trial. This Court granted jurisdiction and observed that "whichever way we decide on the merits, it would be intolerable to leave unanswered . . . an important question of freedom of the press under the First Amendment." *Tornillo*, 418 U.S. at 247 n.6. Similarly, the Ohio Supreme Court's decision on the opinion and public figure/public official issues in the instant case creates "an uneasy and unsettled constitutional posture" which "could only further harm the operation of a free press." *Id.* at 247 n.6; accord, *Cox*, 420 U.S. at 486 (1975).

As in *Cox*, the litigation in the instant case could be terminated by a decision of this Court on the merits. "Delaying final decision on the First Amendment claim until after the trial will leave unanswered . . . an important question of freedom of the press under the First Amendment." *Cox*, 420 U.S. at 486. Even if Petitioners were to prevail at the trial level, there "would still remain in effect the unreviewed decision of the State Supreme Court" which "seriously contravenes the principles of the First Amendment as interpreted by this Court, and threatens to chill the freedom of newspapers in Ohio. . . ." *Lorain Journal Co. v. Milkovich*, 449 U.S. 966, 970 (1980), *denying cert.*, (Brennan, J., dissenting); accord, *Cox*, 420 U.S. at 485 (1975).

Consequently, it is irrelevant that Petitioners could conceivably prevail in what would be the third proceeding at the trial court level. If this Court refuses to hear

the instant matter at this time, Petitioners would be precluded from raising their constitutional defenses until such time as they were again able to seek review in the Supreme Court of Ohio. Unless the Supreme Court of Ohio reverses its recent decision in the instant case, Petitioners would be denied review of their constitutional defenses until they could file a third petition for a writ of certiorari with this Court. Therefore, granting immediate review is the best way to avoid "the mischief of economic waste and delayed justice", *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945), and the chilling effect that delay in deciding the constitutional issues in the instant case would inflict on freedom of press in the State of Ohio.

This petition for certiorari is distinct from Petitioners' prior request to this Court in 1980 in which, notwithstanding the Ohio Supreme Court's denial of certiorari, the highest state court decision was that of the Ohio Eleventh District Court of Appeals. Petitioners' constitutional claims have now been reviewed and decided by the highest court in which decision can be had in the State of Ohio. Thus, there is now a final judgment for purposes of 28 U.S.C. Section 1257.

Accepting jurisdiction would not erode principles of comity. The Supreme Court of Ohio has made a final decision on the federal constitutional issues involved in the instant case. This decision is not subject to further review in the state courts. A decision by this Court to grant Petitioners' writ of certiorari would not only do justice in the instant case but also protect the press in Ohio from "operating in the shadow . . . of a rule of law . . . the constitutionality of which is in serious doubt." *Cox*, 420 U.S. at 486. Therefore, this Court has jurisdiction to hear the instant case and certiorari should be granted.

CONCLUSION

For the reasons set forth above, a writ of certiorari should be issued to review the judgment of the Supreme Court of the State of Ohio.

Respectfully submitted,

DAVID L. HERZER, *Counsel of Record*
1144 West Erie Avenue
Lorain, Ohio 44052
(216) 244-5268
Attorney for Petitioners

Of Counsel

RICHARD D. PANZA
RICHARD A. NAEGELE
MARK I. BOGART
RICHARD A. HORVITZ
WICKENS, HERZER & PANZA
Co., L.P.A.
1144 West Erie Avenue
Lorain, Ohio 44052

Dated: May 3, 1985

APPENDIX

**OPINION OF THE SUPREME COURT OF THE
STATE OF OHIO**

(Decided December 31, 1984)

No. 84-1833

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS

MICHAEL MILKOVICH, SR.,
Appellant,

vs.

THE NEWS HERALD, et al.,
Appellees.

15 Ohio St. 3d 292

*Defamation—Libel—"Public figure" or "public official,"
construed—"Opinions" actionable, when.*

APPEAL from the Court of Appeals for Lake County.

Plaintiff-appellant, Michael Milkovich, Sr., is the former head wrestling coach of Maple Heights High School in Cuyahoga County. On February 9, 1974, appellant's wrestling team had a meet with Mentor High School. A fight broke out involving spectators and team members from both squads after a Maple Heights wrestler was disqualified by the referee.

As a result of the altercation, the Ohio High School Athletic Association ("OHSAA") held hearings and issued

sanctions against the Maple Heights team, including a disqualification from the state tournament, a one-year probationary status, and a censuring of appellant.

Thereafter, concerned parents and involved wrestlers filed an action in the Court of Common Pleas of Franklin County challenging the OHSAA's sanctions on due process grounds. Although appellant was called as a witness to testify at this proceeding, he was not a party to the action. The trial court ruled that OHSAA violated due process in imposing the sanctions and ordered that the suspension imposed be removed. *Barrett v. Ohio High School Athletic Assn.* (Jan. 7, 1975), Franklin C.P. No. 74 Civ. 09-3390, unreported.

The day after the trial court's decision, defendant-appellee Theodore Diadiun, a sports writer for defendant-appellee The News-Herald in Willoughby, wrote and published a newspaper article entitled "Maple beat the law with the 'big lie.'" The article was continued to the inside of the paper where the headline read "* * * Diadiun says Maple told a lie." The article went on to allege, *inter alia*, that appellant and the former superintendent of the Maple Heights School District "* * * lied at the hearing after each having given his solemn oath to tell the truth." The record indicates that Diadiun did attend the wrestling match and OHSAA hearing, but not the Franklin County judicial proceedings.

Appellant commenced the instant defamation action in the Court of Common Pleas of Lake County against The News-Herald, its parent company Lorain Journal Co., and Diadiun. Appellant, in his original and amended complaints, alleged that the following passages of the Diadiun article were actionable and libelous:

"Maple beat the law with the 'big lie.'"

"* * * a lesson was learned (or relearned) yesterday by the student body of Maple Heights High School, and by anyone who attended the Maple-Mentor wrestling meet of last Feb. 8.

"A lesson which, sadly, in view of the events of the past year, is well they learned early.

"It is simply this: If you get in a jam, lie your way out.

"If you're successful enough, and powerful enough, and can sound sincere enough, you stand an excellent chance of making the lie stand up, regardless of what really happened.

"The teachers responsible were mainly head Maple wrestling coach, Mike Milkovich, and former superintendent of schools, H. Donald Scott."

"Anyone who attended the meet, whether he be from Maple Heights, Mentor, or impartial observer, knows in his heart that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth.

"But they got away with it.

"Is this the kind of lesson we want our young people learning from their high school administrators and coaches?

"I think not."

Prior to trial, the trial court determined that appellant was a public figure, and as such, would be required to establish actual malice on appellees' part under *New York Times Co. v. Sullivan* (1964), 376 U.S. 254.

A jury trial was held, but at the close of appellant's case, the trial court directed a verdict in favor of all the appellees on the basis that appellant had failed to

establish, by clear and convincing evidence, that the article was written and published with actual malice.

Upon appeal, the court of appeals reversed and remanded, holding that a reasonable jury could have found that appellees acted with actual malice toward appellant. *Milkovich v. Lorain Journal Co.* (1979), 65 Ohio App. 2d 143 [19 O.O.3d 99]. This court overruled appellees' motion to certify the record (case No. 80-107), and the United States Supreme Court in *Lorain Journal Co. v. Milkovich* (1980), 449 U.S. 966, denied certiorari over the published dissent of Justice Brennan.

Upon remand, the appellees filed a motion for summary judgment contending that the alleged libel was protected because it amounted to an expression of opinion. The trial court agreed, and granted summary judgment in favor of appellees.

Upon appellant's appeal to the court of appeals, the trial court's decision was affirmed. The appellate court held that appellant was a public figure and had failed to prove that the alleged libel was done with actual malice. The court further held that the article was a constitutionally protected opinion.

The cause is now before this court upon the allowance of a motion to certify the record.

Mr. Brent L. English, for appellant.

Wickens, Herzer & Panza Co., L.P.A., Mr. David L. Herzer, Mr. Richard D. Panza, Mr. Richard A. Naegel and Mr. John J. Hurley, Jr., for appellees.

Per Curiam. The matter presented for our review involves important First Amendment considerations which require us to weigh the important interests of an uninhibited press and the need for judicial redress of libelous utterances.

I

The first issue before this court is whether appellant Milkovich is a "public figure" or "public official" as a matter of law.

The appellees argue that appellant is precluded from raising the issue that he is not a public figure, because he failed to preserve the issue during the initial appellate process of the cause.

In rejecting this argument we find that upon a careful review of the record, appellant has not waived this issue, and therefore, the issue is properly presented before this court.

In determining the status of appellant with respect to defamation law, a review of the pertinent United States Supreme Court decisions in this area is in order.

In the seminal case of *New York Times Co. v. Sullivan* (1964), 376 U.S. 254, the Supreme Court held that public officials could not recover for defamation absent proof by clear and convincing evidence that such defamation was undertaken with "actual malice." (Hereinafter referred to as "N.Y. Times standard.") Such a standard was similarly adopted by this court in *Dupler v. Mansfield Journal* (1980), 64 Ohio St. 2d 116 [18 O.O.3d 354].

Then, in *Rosenblatt v. Baer* (1966), 383 U.S. 75, the high court stated that the inquiry into whether one is a public official is necessarily a question of law for the trial judge to determine.

The Supreme Court extended the N.Y. Times standard to cover "public figures" in *Curtis Publishing Co. v. Butts* (1967), 388 U.S. 130. In that case, the court defined a public figure as one who commanded a substantial amount of public interest by his status alone, or one who had

thrust himself by purposeful activity into the vortex of an important public controversy. The court reasoned that public figures should be held to the more difficult *N.Y. Times* standard because public figures have sufficient access to the means of counterargument in order to expose the falsity of the defamation complained of. *Id.* at 155.

The court further extended the *N.Y. Times* standard in *Rosenbloom v. Metromedia, Inc.* (1971), 403 U.S. 29, to private individuals where the matter reported was of concern to the public. *Rosenbloom* was a plurality opinion, and marked the most comprehensive application of the *N.Y. Times* standard. However, the rule of law set forth in *Rosenbloom* was unable to command a majority vote of the justices, and revealed the disagreement within the court that, perhaps, the application of the *N.Y. Times* standard was in need of further refinement.

We believe that if *Rosenbloom* and *Butts* were the last statements made by the high court concerning the definition of a public figure or official, we would be compelled to agree with the courts below that Milkovich is a public figure, and that the *N.Y. Times* standard would be applicable to his claim for relief. Needless to say, the *Rosenbloom* extension of the *N.Y. Times* standard to private individuals was reexamined in *Gertz v. Robert Welch, Inc.* (1974), 418 U.S. 323, and the Supreme Court retreated from its prior holding. In *Gertz*, the high court acknowledged the necessity of maintaining the *N.Y. Times* standard with respect to public figures and officials in order to fortify First Amendment freedom and to prevent self-censorship by the media. However, the court stated that the need to avoid self-censorship by the media was not the only societal value at issue. *Id.* at 341. With respect to private individuals, the court held that a different standard must apply in order to protect the state's interest

in compensating injury to the reputation of private persons. Therefore, the *Gertz* court redefined the meaning of a public figure in the following manner:

"For the most part those who attain this status [as a public figure] have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." *Id.* at 345.

The court in *Gertz* also noted that a person can become a public figure for a limited range of issues by being drawn or voluntarily injecting himself into a particular public controversy. In holding that *Gertz* was not a public figure for the purposes of defamation law, the court stated that although *Gertz* was well known in some circles, he had achieved no general fame or notoriety in the community, and had no persuasive involvement in the affairs of society. *Id.* at 351-352.

Two years later, the high court had before it the case of *Time, Inc. v. Firestone* (1976), 424 U.S. 448. In *Firestone*, the court reiterated its holding in *Gertz* with respect to the definition of a public figure, and held that the plaintiff, Mrs. Firestone, was not a public figure under *Gertz*. In spite of the fact that Mrs. Firestone was prominent among the "400" of Palm Beach Society, that she had subscribed to a press clipping service which evidenced her frequent mention in the printed medium, and that she had held several press conferences during the course of her divorce proceedings (*id.* at 484-485 [dissenting opinion]), the court found that the *Gertz* definition of public figure status had not been satisfied. The court also stated

that Mrs. Firestone's divorce proceeding was not the type of "public controversy" envisioned in *Gertz*. *Id.* at 454.

More recently, the Supreme Court sustained the *Gertz* characterization of a public figure in *Hutchinson v. Proxmire* (1979), 443 U.S. 111, 134; and *Wolston v. Reader's Digest Assn., Inc.* (1979), 443 U.S. 157, 164.

Turning our attention to the matter at hand, the appellees herein contend that in view of the accomplishments and honors earned by Milkovich in the area of high school wrestling,¹ the lower courts properly designated

1. The following comprises a list of achievements and distinctions which, appellees contend, relegate Milkovich to the status of a public figure:

"(a) National Coach of the Year Award, Portland, Oregon, 1977.

"(b) Received Congressional Record Citation.

"(c) National Council of High School Coaches Award.

"(d) Inducted into the National Helms Hall of Fame.

"(e) National Achievement Award for 100 victories without loss by 'Scholastic Wrestling News'.

"(f) Conducts wrestling clinics throughout the United States Sponsored by State Associations and Coaches Organizations.

"(g) Speaker at Coaches Associations throughout United States: South Carolina, Florida, New York, Indiana, all over the nation.

"(h) No other coach in United States ever close to his record.

"(i) Honored with citation from Ohio Senate.

"(j) Honored with citation from Ohio House of Representatives.

"(k) Charter member, Ohio Coaches Hall of Fame.

"(l) Received United States Wrestling Federation Award.

"(m) Honored and cited by Council of City of Cleveland.

"(n) Honored by City of Maple Heights: Mike Milkovich Day.

"(o) Past President, Ohio Coaches Association.

"(p) Conducts wrestling school at Baldwin-Wallace College.

(Continued on following page)

him as a public figure. Appellees submit, and the court of appeals agreed, that the *Butts* decision is quite similar to the case at bar in that both Butts and Milkovich attained pervasive notoriety in their respective communities as prominent sports personalities, and that, therefore, Milkovich must be held to be a public figure in the same manner as Butts.

We disagree, and find that such a determination by this court would require us to ignore the redefinition of the public figure status as enunciated in *Gertz* and its progeny. In applying the *Gertz* standard to the case *sub judice*, we hold that Milkovich is not a public figure as that term is utilized in First Amendment analysis. While appellant may be an individual recognized and admired in his community for his coaching achievements, he does not occupy a position of persuasive power and influence by virtue of those achievements. By the same token, appellant's position in his community does not put him at the forefront of public controversies where he would attempt to exert influence over the resolution of those controversies. While appellant did become involved in a controversy surrounding the events during and subsequent to his team's wrestling match with Mentor High School, appellant never thrust himself to the forefront of that controversy in order to influence its decision. Furthermore, it cannot be said

Footnote continued—

"(q) Speaker at schools.

"(r) Teams have 265 wins against 25 losses.

"(s) Honored for winning four consecutive state titles.

"(t) Winner of ten (10) Ohio state team titles.

"(u) Placed team in top 3 of Ohio 22 out of 25 years.

"(v) Received Kent State University Hall of Fame Award.

"(w) Honored with gifts, proclamations, and awards on retirement." (Citations to record omitted.)

that appellant assumed the risks of public life through the advertisement of his wrestling clinics. If this were the case, then any widespread advertisement for purely business purposes could result in the classification of an individual as a public figure. Given the application of the public figure definition since *Gertz*, we find appellant's status to be akin to the status of the plaintiff in *Firestone, supra*, rather than the status of the athletic director in *Butts, supra*.

Likewise, we reject appellees' argument that appellant is also a "public official" by virtue of his employment as a public high school teacher and coach. The United States Supreme Court stated in *Rosenblatt, supra*, at 85:

"* * * It is clear, therefore, that the 'public official' designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs."

Our interpretation of *Rosenblatt* leads us to conclude that the facts of the instant case are insufficient to qualify appellant as a public official for the purposes of defamation law. While appellees place great reliance on the case of *Johnston v. Corinthian Television Corp.* (Okla. 1978), 583 P.2d 1101, where a grade school wrestling coach was held to be a public official, we find that a similar interpretation by this court would unduly exaggerate the "public official" designation beyond its original intent. In any event, we are unpersuaded that the *Rosenblatt* definition of a public official was intended to encompass a person like appellant under the facts and circumstances contained in the instant cause.

Therefore, we hold that for the purposes of defamation law and analysis as set forth in *N.Y. Times Co.* and *Gertz*

and their progeny, the appellant herein is not a public figure or public official as a matter of law. On remand, the trial court is instructed to proceed under the rule of law pronounced in *Embers Supper Club, Inc. v. Scripps-Howard Broadcasting Co.* (1984), 9 Ohio St. 3d 22, rather than that rule of law set forth in *Dupler, supra*.

II

Having found appellant to be a private individual in the realm of First Amendment analysis, our focus turns to the issue of whether the alleged defamatory article expresses constitutionally protected opinion; or whether it contains an assertion of fact which, if false, is not protected by the First Amendment. The courts below held that the article in question expressed the author's "heartfelt" opinion, thus rendering it non-actionable as a matter of law.

The United States Supreme Court stated in *Gertz, supra*, at 339-340:

"We begin with the common ground. Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact. * * *"

Many courts have interpreted this statement as requiring absolute constitutional protection for statements of opinion in the context of the laws of libel. See, e.g., *Orr v. Argus Press Co.* (C.A. 6, 1978), 586 F. 2d 1108. This court intimated in *Yeager v. Local Union 20* (1983), 6 Ohio St. 3d 369, 372, albeit in the context of a labor dispute, that where language is used which is capable of different meanings, such language constitutes an expression of opin-

ion, not fact, and is protected. Nevertheless, this court has not adopted any specific standard with which to guide courts in determining what constitutes an expression of opinion, and what constitutes an expression of fact.

Some courts have adopted a variation of a "truth or falsity" test in order to distinguish between assertions of fact and assertions of opinion. See, e.g., *Buckley v. Littell* (C.A. 2, 1976), 539 F. 2d 882, certiorari denied (1977), 429 U.S. 1062. Under this approach, the objectionable statements are evaluated to determine whether the statements are capable of being proven false empirically.

Other courts have analyzed the fact/opinion distinction by applying the standard of the "ordinary person"; i.e., whether an ordinary reader of the alleged libelous statements would understand the statements as an expression of the author's opinion, or as statements of existing facts. See, e.g., *Mashburn v. Collin* (La. 1977), 355 So. 2d 879.²

While we decline to establish a *per se* rule in determining what constitutes a protected opinion or a potentially redressable assertion of fact, our review of the instant cause leads us to conclude that the lower courts erred in holding that the statements in issue were nothing more than the writer's "heartfelt" opinion. We find that the statements in issue are factual assertions as a matter of law, and are not constitutionally protected as the opinions of the writer. Nothing in the article effectively precautions the reader that the author's statements are merely his considered opinions. The plain import of the author's assertions is that Milkovich, *inter alia*, committed the crime of perjury in a court of law.

2. For a general exploration of the various tests courts have implemented in examining the fact/opinion dichotomy, see Note, *The Fact-Opinion Distinction in First Amendment Libel Law: The Need for a Bright-Line Rule* (1984), 72 Geo. L.J. 1817.

In reversing the appellate court on this issue, we are persuaded by the cogent rationale supplied by Judge Friendly in *Cianci v. New Times Publishing Co.* (C.A. 2, 1980), 639 F. 2d 54, at 64:

"It would be destructive of the law of libel if a writer could escape liability for accusations of crime simply by using, explicitly or implicitly, the words 'I think'."

Therefore, based upon the foregoing, we reverse the judgment of the court of appeals, and remand the cause to the trial court for further proceedings consistent with this opinion.

*Judgment reversed
and cause remanded.*

CELEBREZZE, C.J., SWEENEY, C. BROWN and J. P. CELEBREZZE, JJ., concur.

W. BROWN, J., dissents.

LOCHER and HOLMES, JJ., dissent separately.

WILLIAM B. BROWN, J., dissenting. I respectfully dissent on the basis that the alleged defamatory article expresses a constitutionally protected opinion and accordingly cannot be the basis of a defamation action.

There is a growing judicial recognition that pure statements of opinion are absolutely privileged from being the basis for a defamation suit. See, e.g., *Gertz v. Robert Welch, Inc.* (1974), 418 U.S. 324. In *Orr v. Argus Press Co.* (C.A. 6, 1978), 586 F. 2d 1108, 1114, the *Gertz* principle regarding a statement of opinion was applied: "It is now established as a matter of constitutional law that a statement of opinion about matters which are publicly known is not defamatory." The underlying rationale is that even erroneous opinion is to be tolerated in order that self-censorship not prevail over robust public debate.

In the instant case, appellant was essentially accused in the article of perjury, i.e., lying under oath. The great weight of authority holds that allegations concerning illegality are not absolutely protected by the First Amendment.

"While the Restatement (Second) of Torts posits an absolute privilege for opinions, it explicitly recognizes that an allegation of criminal behavior is properly the subject of a defamation action. Most courts have not faced the question of whether such accusations should be categorized as facts or opinions. They have acknowledged, nonetheless, either implicitly or explicitly, that such accusations are not absolutely protected under the first amendment and have only the more limited *New York Times* privilege reserved for statements not made in reckless disregard of the truth." Note, Fact and Opinion After *Gertz v. Robert Welch, Inc.*: The Evolution of a Privilege (1981), 34 Rutgers L. Rev. 81, 114-115.

In the instant case, the statements were not made in reckless disregard of the truth. The author disclosed the basis upon which his opinions were formulated. He stated he attended the wrestling match in question and was present at the OHSAA hearing. The writer also indicated he had a recounting of the due process proceedings held in Franklin County from Dr. Meyer, who had also been at the OHSAA hearing. Under these facts, I cannot find that the writer acted in reckless disregard of the truth. Resultantly, in my opinion, this editorial opinion may not form the basis of a defamation suit.

Having determined that the article constituted a constitutionally privileged opinion, it is unnecessary to consider the issue of whether appellant was a public figure.

HOLMES, J., dissenting. In the first instance, it appears to me that the publication with which we are concerned here is an expression of an opinion by the reporter, and not an untruthful statement of fact. As such, the statement is not actionable under First Amendment protection. *Gertz v. Robert Welch, Inc.* (1974), 418 U.S. 323; *Hotchner v. Castillo-Puche* (C.A.2, 1977), 551 F. 2d 910; and *Orr v. Argus-Press Co.* (C.A.6, 1978), 586 F. 2d 1108.

An opinion can be libelous only if a defamed plaintiff establishes four very limited conditions: (1) the opinion article must imply the existence of facts unknown to the general reader; (2) these implied, unknown facts must not be disclosed in the article; (3) these implied, undisclosed facts must be false; and (4) these implied, undisclosed and false facts must be the basis for the opinions stated in the article. *Orr v. Argus-Press Co.*, *supra*; *Hotchner v. Castillo-Puche*, *supra*. The privilege for opinion can be lost only if the article does not disclose the facts underlying the opinions. 3 Restatement of the Law 2d, Torts (1977) 170, Section 566.

In the case before us, the trial court carefully reviewed the subject article and then held that the article fully disclosed the facts upon which its opinions were formulated. In affirming the trial court's decision, the court of appeals held that "[t]he record supports the trial court's analysis. Moreover, the article, as an opinion, disclosed its underlying facts. The writer * * * referred to events and circumstances upon which he based his opinion."

The article plainly refers to at least three distinct but related events upon which the author's personal opinions and editorial conclusions were derived:

(1) The February 9, 1974 wrestling meet between Maple Heights High School and Mentor High School;

(2) the administrative hearings on the wrestling meet conducted by the Ohio High School Athletic Association; and

(3) the proceedings before, and the decision of, the Court of Common Pleas of Franklin County regarding the due process aspects of the OHSAA administrative hearings.

The author further states in the article that he attended, covered and reported upon the wrestling match in question and the administrative hearings before the OHSAA. The article also explains that the opinions expressed regarding appellant's testimony before the Court of Common Pleas of Franklin County were based upon the author's conversation with Dr. Harold Meyer, Commissioner of the OHSAA, who attended the court hearing. Thus, a reader was free to agree or disagree with Diadiun's expressed opinions based upon the facts clearly stated in the article.

Furthermore, it is my view that the lower courts must be affirmed under the facts presented here in that Milkovich could well be considered to be a public figure under the criteria set forth in the recent opinions of the United States Supreme Court. In *Curtis Publishing Co. v. Butts* (1967), 388 U.S. 130, the court held that a person's prominence in the sports world could make him a public figure based upon the facts presented in a given case. Similarly, the proof before the trier of the facts in this case established that Milkovich was a public figure within the area of the publication of appellee's newspaper column, and perhaps reasonably beyond such geographic area. By his own admission, Milkovich is one of America's outstanding coaches and a nationally acclaimed sports figure.

His coaching record is unparalleled in Ohio and throughout the country, and he has been honored by civic groups, legislative bodies and numerous sports organizations.³

In accordance with the Supreme Court's requirements in *Butts, supra*, the trial court in the case *sub judice* properly ruled, in summary judgment proceedings, that Milkovich is a public figure. Appellant's attainments and prominence as a national sports figure, honored by sports, civic and legislative bodies, with coaching records seemingly unparalleled in Ohio and nationally, unquestionably establish him as a public figure.

In addition, Milkovich, by his own actions, has established himself as a "public figure" under the standards of *Gertz, supra*. In that case, the Supreme Court summarized the law regarding "public figure" status in libel cases by stating that, "[t]hose who, by reason of the notoriety of their achievement or the vigor and success with which they seek the public's attention, are properly classed as public figures * * *." *Id.* at 342.

Based on the foregoing, and construing all of the evidence most favorably in favor of Milkovich at the time of the motion for summary judgment, I conclude that the appellant failed to raise any genuine issue of material fact upon which a jury could find actual malice with any standard of convincing clarity, and therefore the trial court's granting of summary judgment was proper.

Accordingly, I would affirm the judgment of the court of appeals.

LOCHER, J., concurs in the foregoing dissenting opinion.

3. A list of such accomplishments is found in fn. 1 of the majority opinion.

**DISSENT OF MR. JUSTICE BRENNAN IN THE
DENIAL OF PETITIONERS' FIRST REQUEST
FOR CERTIORARI**

(Dated November 3, 1980)

No. 80-100

THE SUPREME COURT OF THE UNITED STATES

LORAIN JOURNAL CO., et al.,
Petitioners,

vs.

MICHAEL MILKOVICH, SR.,
Respondent.

449 U.S. 966

No. 80-100. LORAIN JOURNAL CO. et al. v. MILKOVICH. Ct. App. Ohio, Lake County. Motions of Beacon Journal Publishing Co. et al. and Ohio Newspapers Association for leave to file briefs as *amici curiae* granted. Certiorari denied. JUSTICE STEWART would deny this petition for want of a final judgment. Reported below: 65 Ohio App. 2d 143, 416 N. E. 2d 662.

JUSTICE BRENNAN, dissenting.

This petition for certiorari raises an important question concerning limitations on the authority of trial courts to grant dismissals, summary judgments, or judgments notwithstanding the verdict¹ in favor of media defendants

1. Although the decision below concerned directed verdicts, its holding would affect the courts' treatment of summary judgments and judgments notwithstanding the verdict as well. In each of these situations, the court is called upon to answer the same question: whether there is sufficient evidence for the jury to find actual malice under the applicable "clear and convincing evidence" burden of proof.

in libel actions, based on the qualified privilege outlined in *New York Times Co. v. Sullivan*, 376 U. S. 254 (1964).

On January 8, 1975, the News-Herald of Willoughby, Ohio, published a column by sportswriter Ted Diadiun criticizing respondent Michael Milkovich, a wrestling coach at Maple Heights High School, who is treated as a "public figure" for purposes of this case. Headlined "Maple beat the law with the 'big lie'" the column accused Milkovich of lying about a fracas that occurred during one of his team's wrestling matches.

On February 9, 1974, the Maple High wrestling team, coached by Milkovich, faced a team from Mentor High School. A brawl involving both wrestlers and spectators erupted after a controversial ruling by a referee. Several wrestlers were injured. The Ohio High School Athletic Association (OHSAA) subsequently conducted a hearing into the occurrence, censured Milkovich for his conduct at the match, placed his team on probation for the school year, and declared the team ineligible to compete in the state wrestling tournament. Diadiun attended and reported on both the match and the hearing, at which Milkovich had defended his behavior. Thereafter, a group of parents and high school wrestlers filed suit in Franklin County Common Pleas Court, claiming that the OHSAA had denied the team due process. Milkovich, not a party to that lawsuit, appeared as a witness for the plaintiffs. On January 7, 1975, the court held that due process had been denied, and enjoined the team's suspension. *Barrett v. Ohio High School Athletic Assn.*, No. 74CV-09-3390.²

2. The court ruled that the wrestling team was denied its right to cross-examine witnesses and to call witnesses on its behalf. The court did not make any factual findings concerning the underlying occurrences, nor did it comment on those occurrences.

Diadiun did not attend the court hearing, review the transcript, or read the court's opinion, but he wrote a column about the decision based on his own recollection of the wrestling match and ensuing OHSAA hearing and on a description of the court proceeding given him by an OHSAA Commissioner. In the column, Diadiun stated that Milkovich and others had "misrepresented" the occurrences at the OHSAA hearing, and that Milkovich's testimony "had enough contradictions and obvious untruths so that the six board members were able to see through it." Diadiun went on to say, however, that at the later court hearing Milkovich and a fellow witness "apparently had their version of the incident polished and reconstructed, and the judge apparently believed them." Diadiun concluded that anyone who had attended the match "knows in his heart that Milkovich . . . lied at the hearing after . . . having given his solemn oath to tell the truth. But [he] got away with it."

Milkovich filed a libel action in state court against petitioners Diadiun, the News-Herald, and the latter's parent corporation. Petitioners moved for summary judgment. The court held that Milkovich is a public figure for purposes of the *New York Times* test,³ but denied summary judgment. The action was then tried to a jury. After five days of trial, at the close of Milkovich's evidence, petitioners moved for a directed verdict. They argued that Milkovich had failed to proffer sufficient evidence from which the jury could conclude that Diadiun's column had been published with actual malice under the *New York Times* test. The court granted the motion for directed verdict, stating that the evidence, considered most strongly in favor of Milkovich, "fails to establish by clear

3. The ruling that Milkovich is a public figure is unchallenged.

and convincing proof that the article . . . was published with knowledge of its falsity or in reckless disregard of the truth."

Milkovich appealed to the State Court of Appeals, which reversed and remanded for trial. The court stated that Diadiun's column conflicted with the factual determination reached in the earlier Common Pleas Court injunctive action, and held that this conflict alone constituted sufficient evidence of actual malice to withstand petitioner's motion for directed verdict.⁴ Petitioners appealed to the Ohio Supreme Court, and also sought review in the nature of certiorari. The Ohio Supreme Court dismissed the appeal as raising "no substantial constitutional question" and otherwise denied review. The court also denied petitioners' motion for rehearing.⁵

4. The court stated:

"In the instant case, a court of law, based on the evidence before it, and having the right to determine where the truth lay, even though on a due process question, determined the truth in favor of the plaintiff and the wrestling team he coached. Thus, he had his day in court and was at that time at least, exonerated by the only recognized arbiter of the truth in our American judicial system, but thereafter was still called a liar for the testimony he allegedly gave during that trial. . . . It would appear that, though the press might be at liberty to criticize the judicial process and the results of a given case, unless and until the judgment of the court is overturned on appeal, the determination of what constitutes that truth has been made. Thus, any news article written either as fact as a news item, or as opinion, that is published knowing that it conflicts with a judicial determination of the truth, may, in our opinion, be regarded as a reckless disregard of the truth so as to constitute 'actual malice' so as to be actionable libel of a public person. Whether, in a given case, it constitutes a reckless disregard of the truth, is not, in our opinion, a question of law, but a question of fact based on the evidence before the court." 65 Ohio App. 2d 143, 146, 416 N. E. 2d 662, 666 (1979).

5. Although the appellate court below remanded the case for retrial, including a jury determination on the actual-malice issue, the decision was nonetheless a final judgment for purposes

(Continued on following page)

The import of the Ohio appellate court's holding is plainly that, even in the absence of proof of knowing falsehood or reckless disregard for the truth, a newspaper forfeits its right to a directed verdict, summary judgment, or judgment notwithstanding the verdict on the issue of actual malice if it has published a statement that conflicts, however tangentially, with a decision by a court. This holding is clearly contrary to the First Amendment and to the relevant precedents of this Court. I had supposed it was settled that newspapers are privileged to publish their views of the facts, so long as those views are not recklessly or knowingly false. It matters not that such views may conflict with those of a court, for the press is free to differ with judicial determinations. In the libel area, neither a court nor any other institution is the "recognized arbiter of the truth," as the court below asserted. See *Gertz v. Robert Welch, Inc.*, 418 U. S. 323, 339-340 (1974).⁶

One part of the "strategic protection" that decisions of this Court have extended to the press in the libel area is the insistence that a public figure can prevail "only on clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth." *Gertz v. Robert Welch, Inc.*, *supra*, at 342; *New York Times Co. v. Sullivan*, 376

Footnote continued—

of 28 U. S. C. § 1257. A decision in favor of petitioners would terminate the litigation, while a failure to decide the question now would leave the press in Ohio "operating in the shadow of . . . a rule of law . . . the constitutionality of which is in serious doubt." *Cox Broadcasting Corp. v. Cohn*, 420 U. S. 469, 486 (1975); *Miami Herald Publishing Co. v. Tornillo*, 418 U. S. 241, 246-247 (1974).

6. Indeed, at common law, a factual finding embodied in the judgment in another cause could not even be used as evidence of that fact in court. 5 J. Wigmore, *Evidence* § 1671a, pp. 806-807 (Chadbourn rev. 1974).

U. S., at 285-286. The court in a libel action has a responsibility to ensure that sufficient evidence of actual malice has been introduced to permit a jury finding under this exacting standard. This protection must not be withdrawn merely because the press account may have differed with the conclusions of a court, lest the "uninhibited, robust, and wide-open." *New York Times v. Sullivan*, *supra*, at 270, discussion of judicial proceedings be deterred. See *Richmond Newspapers, Inc. v. Virginia*, 448 U. S. 555 (1980).

The consequence of the erroneous ruling in this case is particularly apparent on the facts: petitioners were denied a directed verdict on the strength of a prior court opinion that did not even discuss, let alone decide, what had happened at the disrupted wrestling match or whether Milkovich had testified truthfully. The court had merely ruled that the Maple High School wrestling team was denied certain procedural safeguards required under due process. Thus, it is abundantly apparent that the state court's conclusion that Diadiun wrote this column "knowing that it conflicts with a judicial determination of the truth" is unpersuasive even on its own terms.

Because in my view the decision of the Ohio appellate court in this case seriously contravenes the principles of the First Amendment as interpreted by this Court, and threatens to chill the freedom of newspapers in Ohio to publish their view of the facts where they differ with the view of the courts, I dissent and would grant certiorari to review this important question of constitutional law.

**JUDGMENT ENTRY IN THE COURT OF COMMON
PLEAS, LAKE COUNTY, OHIO, GRANTING IN
PART AND DENYING IN PART DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT**

(Dated May 23, 1977)

No. 75 Civ 0301

IN THE COURT OF COMMON PLEAS
LAKE COUNTY, OHIO

MICHAEL MILKOVICH, SR.,
Plaintiff,

vs.

THE NEWS HERALD, et al.,
Defendants.

JUDGMENT ENTRY

This day this cause came on to be heard on the motion of the defendant for summary judgment briefs of the parties, depositions and affidavits furnished by both parties.

Upon consideration the Court finds said motion well taken in part and not well taken in part.

First, the defendant seeks a finding that the plaintiff is a public figure within the meaning of *Curtis v. Butts*, 388 U.S. 130. The Court is of the opinion that it has been clearly shown that the plaintiff is indeed a public figure.

The defendant also seeks an order finding that there was no knowledge of falsity or reckless disregard of truth

in this case. The Court finds the evidence to be conflicting and therefore not the subject for summary judgment.

IT IS THEREFORE ORDERED that the request for summary judgment be granted to the defendant on the one issue of the public figure.

/s/ JOHN F. CLAIR, JR.

Judge of the Court of Common Pleas

**JOURNAL ENTRY OF THE COURT OF COMMON
PLEAS, LAKE COUNTY, OHIO, GRANTING DE-
FENDANTS' MOTION FOR A DIRECTED VER-
DICT**

(Filed May 1, 1978)

Court adjourned to Monday 5/1/1978, Court not pursu-
ant to adjournment. Present and presiding, JOHN F
CLAIR, JR., Judge, JOHN M. PARKS, Judge, ROSS D. AVEL-
LONE, Judge.

Case No. 75 Civ 0301

IN THE COURT OF COMMON PLEAS
LAKE COUNTY, OHIO

MICHAEL MILKOVICH, SR.,
Plaintiff,

vs.

THE NEWS-HERALD, et al.,
Defendants.

JOURNAL ENTRY

The Court, coming on to consider the Motion of the
Defendants for a directed verdict in favor of the Defen-
dants, which Motion was made at the close of the Plain-
tiff's evidence in the fifth day of trial, and upon consid-
eration of the arguments of counsel, the Court finds that
the Motion is well taken and that the said Motion should
be and hereby is granted.

The Court finds that reasonable minds can come but
to one conclusion, to-wit: that the evidence (construed

most strongly in favor of the Plaintiff) fails to establish
by clear and convincing proof that the article which was
the subject of this action was published with knowledge
of its falsity or in reckless disregard of the truth, and
that there is no justiciable issue for the jury. Exceptions
to the Plaintiff.

/s/ JOHN F. CLAIR, J.
Judge

**JUDGMENT ENTRY OF THE COURT OF APPEALS
OF OHIO, ELEVENTH DISTRICT, COUNTY OF
LAKE**

(Filed December 3, 1979)

Case No. 6-287

IN THE COURT OF APPEALS
ELEVENTH DISTRICT

MICHAEL MILKOVICH,
Appellant,

vs

THE LORAIN JOURNAL COMPANY, *et al.*,
Appellees.

JUDGMENT ENTRY

This cause came on to be heard upon the record in the Trial Court, and was briefed and argued by counsel for the parties.

Upon consideration whereof, this Court certifies that in its opinion substantial justice has not been done the party complaining, as shown by the record of the proceedings and judgment under review, and the judgment of the Trial Court is reversed. Each Assignment of Error was reviewed by the Court and disposed of as set forth in this Court's Opinion which is incorporated hereby by reference.

No other error appearing in the record, judgment reversed and cause remanded for further proceedings. Cook, J., dissents. See Dissenting Opinion.

It is ordered that appellant recover of appellee the costs herein.

It is ordered that a special mandate issue out of this Court directing the Trial Court to carry this judgment into execution. A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

/s/ EDWIN T. HOFSTETTER

Judge

For the Court

(CONNORS, J., of the 6th Appellate District, sitting for DAHLING, P.J.)

Cook, J., Dissents
(See Dissenting Opinion)

**OPINION OF THE COURT OF APPEALS OF OHIO,
ELEVENTH DISTRICT, COUNTY OF LAKE**

(Dated December 3, 1979)

Case No. 6-287

COURT OF APPEALS OF OHIO
ELEVENTH DISTRICT
COUNTY OF LAKE

MICHAEL MILKOVICH,
Plaintiff-Appellant,

vs.

THE LORAIN JOURNAL COMPANY, et al.,
Defendant-Appellees.

OPINION

Judges:

HON. EDWIN T. HOFSTETTER, J.; HON. ROBERT E. COOK,
J.;

HON. JOHN J. CONNORS, JR., J., Sixth District, by As-
signment, for HON. ALFRED E. DAHLING, P.J.

HOFSTETTER, J.

The matter on appeal came on for trial before a jury. After the plaintiff-appellant rested his case, the defendants jointly moved the Court for a directed verdict in their favor on the ground that there is no justiciable issue for the jury, and that reasonable minds can come but to one conclusion, to-wit, that the proof fails to evidence by clear and convincing proof that the article which is the subject of this action was published with knowledge of its falsity or with reckless disregard as to its truth.

The trial court granted the motion in favor of the defendants, as follows:

The Court finds that reasonable minds can come to but one conclusion, to-wit: that the evidence (construed most strongly in favor of the Plaintiff) fails to establish by clear and convincing proof that the article which was the subject of this action was published with knowledge of its falsity or in reckless disregard of the truth, and that there is no justiciable issue for the jury. Exceptions to the Plaintiff.

It is from this judgment, granting a directed verdict for the defendants, that plaintiff has appealed.

As background, the complaint in the court below was an action in libel filed by the plaintiff-appellant, Michael Milkovich, against the defendants, The Lorain Journal Publishing Company, owner and publisher of the Willoughby News-Herald, and Mr. Theodore Diadiun, as the result of the publication of a certain article on January 8, 1975. The article in question was stipulated at trial and admitted into evidence as plaintiff's Exhibit "D." (T.p. 12.)

The events which led to the eventual publication of this alleged libelous article began on the evening of February 9, 1974, at a routine high school wrestling match between Mentor High School and Maple Heights High School. The latter team was coached by the now-retired Michael Milkovich, appellant herein. It appears that, during and shortly after a wrestling match between Bob Girardi of Maple Heights and Paul Pochatilla of Mentor High School, a melee broke out among the fans and spectators in the crowd, and among the wrestling participants themselves. One of the defendants, Ted Diadiun, a sports-writer for The News-Herald, wrote a series of articles following the occurrence.

Following the altercation, a series of hearings were conducted by the Ohio High School Athletic Association (OHSAA) in Columbus, Ohio, following which the Maple team was totally suspended from state competition, and the appellant, Michael Milkovich, was censured.

It was at this time that a group of parents and wrestlers filed suit in Franklin County Common Pleas Court in an action styled "Barret v. Ohio High School Athletic Association." It was held by that Court that the OHSAA failed to safeguard certain due process rights in suspending the team from state competition, thereby denying the team members of important property rights without due process of law.

Immediately after the announcement of Judge Martin's decision reinstating the Maple team to state competition, the defendants published the alleged libelous article which headlined, "Maple Beat The Law With The Big Lie."

Factually, therefore, it should be noted that, following the alleged melee between the Maple and Mentor wrestling crowds, and as a result of hearings, the Ohio High School Athletic Association (OHSAA) suspended the Maple team from state competition. Defendant Diadiun attended both the wrestling meet between the two teams as well as the OHSAA hearing. The subsequent action against the OHSAA in Franklin County was brought to determine whether certain due process rights were accorded the Maple team before it was suspended from state competition. The defendant Diadiun did not attend that hearing. In the Franklin County trial had on November 8, 1974, the decision announced on January 7, 1975, as noted by the appellees in their brief, reversed the administrative action (of suspension). The reversal was on procedural grounds.

Pertinent to further discussion of defendants-appellee's publication on January 8, 1975, of the article which was headlined "Maple Beat The Law With The Big Lie" are the following statements made during the cross-examination of Diadiun:

Q. Now, when did you first become aware of the fact that this was a due process hearing and not a fault-finding hearing, if ever you became aware of it?

A. I thought that the fault-finding would be included in the trial, yes. I knew that due process was one of the issues. I also thought that one of the issues were (sic) whether or not—who was at fault.

• • • • •

Q. Isn't it a fact, Mr. Diadiun, that you never read any transcript of what occurred at that trial until after you published the article?

A. Yes.

• • • • •

Q. Didn't you think it was necessary for you to read that decision (of Judge Paul Martin of the Franklin County Common Pleas Court) before you published such an article?

A. Like I said, I knew the background of the whole case. I knew what Dr. Meyer told me went on at that trial. I didn't feel that I needed—

• • • • •

Q. The fact of the matter is, you never took the trouble to find that decision and read it, did you?

• • • • •

A. I didn't find the decision, no.

Q. You didn't find it necessary to read it?

A. No.

With the above as a fair predicate of the facts pertinent to our discussion of the directed verdict, the plaintiff-appellant assigned ten errors, as follows:

1. The Court erred in granting the motion of defendant-appellee for directed verdict at the close of testimony of the plaintiff;
2. The Court erred in its ruling that plaintiff failed to meet the burden of proof by clear and convincing evidence at the close of the testimony of the plaintiff, and that it was a necessary element for purposes of ruling upon a Motion For Directed Verdict;
3. The Court erred in its ruling that plaintiff was severely lacking in any evidence to prove defendants published the Article with "knowledge of its falsity";
4. The Court erred in its ruling by applying the incorrect law of Libel i.e. the Actual Malice test by omitting the proposition of law that the publisher acted with "total disregard for truth or falsity" and basing its findings exclusively upon the facts and law that plaintiff was severely lacking in any evidence to prove defendants published the Article with "knowledge of its falsity";
5. The Court erred in failing to apply the legal standards set forth in Rule 50(A) (4), in ruling upon defendant's Motion For Directed Verdict;
6. Should the Appellate Court apply Rule 50(A) (4) to the trial proceeding and ruling in the lower

court, then Appellant alleges the trial court erred in effect in its findings that:

- (a) That reasonable minds could not draw different inferences or conclusions from the evidence presented, relevant to the Actual Malice test i.e. knowledge of its falsity, and/or defendant's total disregard for truth or falsity;
- (b) That reasonable minds could come to but one conclusion, after construing the evidence most strongly in favor of the plaintiff, that there was no dispute, doubt, conflicting testimony, question, or any evidence in plaintiff's case to prove that defendant acted with Actual Malice i.e. knowledge of its falsity, and/or total disregard for truth or falsity in publishing the alleged libelous publication.
7. The Court erred in denying appellant the right to introduce into evidence the transcript of the record of the case of Ray Barrett v. OHSAA in the Court of Common Pleas, Franklin County;
8. The Court erred in its ruling upon defendant's Motion for Directed Verdict, by failing to mention the requirement set forth in Ohio Rule 50(E); and in fact, not construing the evidence most strongly in favor of the plaintiff;
9. The Court erred in its ruling by holding in effect that there was no controversial evidence of any determinative issue for the jury to weigh and that to submit the case to the jury would permit them an opportunity to do unreasonable harm to the parties.
10. The Court erred in its ruling that the defendants acted upon a reliable source.

In the instant case we have some of the attributes of *New York Times Co. v. Sullivan*, 376 U. S. 254, 11 L. Ed. 2d 686. However, we have the additional element involved that the alleged lies spoken of in the news article were made after judicial ascertainment of where the truth lay as it concerned the trial in which the alleged lies were supposedly uttered.

The *Sullivan* case, as we understand it, stands for the proposition that a public official or person such as the plaintiff herein is prohibited from recovering damage for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

All assignments except No. 7 and 10 direct themselves to the impropriety of granting the directed verdict. In furtherance of our above commentary, we hold that the trial court did err. In typical cases such as *Sullivan*, the libel alleged had still to be subjected to judicial process to determine whether libel existed. In the instant case, a court of law, based on the evidence before it, and having the right to determine where the truth lay, even though on a due process question, determined the truth in favor of the plaintiff and the wrestling team he coached. Thus he had his day in court and was, at that time at least, exonerated by the only recognized arbiter of the truth in our American judicial system but thereafter was still called a liar for the testimony he allegedly gave during that trial. Had the news article simply stated that the Court, in the newspaper's judgment, erred, or that the reporter's understanding of the facts differed from that of the Court, no question of libel would be before us. It would appear that, though the press might be at liberty to criticize the judicial process and the results of a given

case, unless and until the judgment of the Court is overturned on appeal, the determination of what constitutes the truth has been made. Thus any news article written either as fact as a news item, or as opinion, that is published knowing that it conflicts with a judicial determination of the truth, may, in our opinion, be regarded as a reckless disregard of the truth so as to constitute "actual malice" so as to be actionable libel of a public person. Whether in a given case, it constitutes a reckless disregard of the truth, is not, in our opinion, a question of law, but a question of fact based on the evidence before the Court.

Thus, where the evidence includes the factual data that (1) a decision was rendered by a trial court in Franklin County on a related matter, (2) that the defendant Diadiun acknowledged he knew such decision was rendered in favor of the plaintiff herein and his team of wrestlers, (3) that he did not attend that trial, and (4) that he did not read the transcript of that trial, it would appear that it is a jury question as to whether the reporter and his newspaper acted with reckless disregard of the truth.

We recognize that it has long been held that a motion for directed verdict raises a question of law only. *Michigan-Ohio-Indiana Coal Assn. v. Nigh, Admr.*, 131 Ohio St. 405. Further, if the facts are undisputed, this issue is one for the Court, but, where the circumstances are such that reasonable minds might reach different conclusions as to inferences to be drawn from the undisputed evidence, there arises a question of fact for the jury: *Bennett v. Sinclair Refining Co.*, 144 Ohio St. 139, 57 NE(2d) 776; *Snider v. Rollins*, 102 Ohio St. 372, 131 NE 733; *Slyder v. Commissioners*, 133 Ohio St. 146, 12 NE(2d) 407; *Yackee v. Napoleon*, 135 Ohio St. 344, 21 NE(2d) 111; *Hamden Lodge v. Ohio Fuel Gas Co.*, 127 Ohio St. 469, 169 NE 246.

For the reasons indicated, we find all assignments, except No. 7 and 10, at least to the extent they relate to the order granting a directed verdict for the defendants, are well taken.

Assignment No. 7, in our opinion, is without merit. The trial judge in that case was the arbiter of the facts. It was his duty to weigh and decide what was determined by the evidence. That determination having been made by that court, its judgment is final unless reversed on appeal. The question of whether the defendants had a justifiable basis for the publication of the "big lie" article so as to exonerate the defendants from either "actual malice" or such reckless disregard of the truth as to constitute malice as set forth in *Sullivan*, must, in our opinion, be predicated on the trial court's decision in that case and not on the evidence elicited therein.

Assignment No. 10, that the Court erred in its ruling that the defendants acted upon a reliable source, is well taken, although not for the reasoning expressed by the appellant. The reliability and believability of the source is for the trier of facts. Paragraphs 3 and 4 of the syllabus in *O'Day v. Webb*, 29 Ohio St. 2d 215, are pertinent, to wit:

3. A motion for directed verdict or a motion for judgment notwithstanding the verdict does not present factual issues, but a question of law, even though in deciding such a motion, it is necessary to review and consider the evidence.
4. It is the duty of a trial court to submit an essential issue to the jury when there is sufficient evidence relating to that issue to permit reasonable minds to reach different conclusions on that issue, or, conversely, to withhold an essential issue from

the jury when there is not sufficient evidence relating to that issue to permit reasonable minds to reach different conclusions on that issue.

We think the trial court erred in considering the question of the reliability of the source of the "defamatory" statements published when the basis for ruling on a directed verdict is not based on factual issues but on questions of law.

For the reasons indicated, the judgment of the trial court is reversed and the cause remanded for further proceedings.

JUDGE EDWIN T. HOFSTETTER

COOK, J. dissents (See Dissenting Opinion)

CONNORS, J., concurs

(CONNORS, J., of the 6th
Appellate District,

sitting for DAHLING, P.J.)

COOK, J. (Dissenting Opinion)

I respectfully dissent from the majority opinion of the Court.

The sole question in the instant cause is whether the trial court erred in granting appellee's motion for a directed verdict at the conclusion of the appellant's evidence.

Civ.R.50, in pertinent part, states:

"(4) When granted on the evidence. When a motion for a directed verdict has been properly made, and the trial court, after construing the evidence most strongly in favor of the party against whom the motion is directed, finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is

adverse to such party, the court shall sustain the motion and direct a verdict for the moving party as to that issue."

A review of the evidence offered by the appellant in the proceedings below indicates reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion was adverse to the party against whom the motion was directed, the appellant.

The benchmark case in the libel law in the United States is *New York Times v. Sullivan*, 376 U.S. 254. In the *New York Times* case, the United States Supreme Court stated at pages 279-280:

"The constitutional guaranty of freedom of speech and press prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice', that is, with knowledge that it was false or with reckless disregard of whether it was false or not; such a qualified privilege of honest mistake of fact is required by the First and Fourteenth Amendments."

In *Curtiss Publishing Co. v. Butts*, 388 U.S. 130 the United States Supreme Court extended the First Amendment safeguards of the *New York Times* case to those defending libel actions brought by public figures as well as public officials. Appellant was found by the trial court to be a public figure.

Here, the newspaper article written by Ted Diadiun of the Willoughby News Herald was based on what he had personally observed at the wrestling match where the incident occurred and the testimony he had personally heard appellant give at the hearing before OHSAA and what he had supposedly learned about appellant's testimony

at a judicial hearing in the Franklin County Common Pleas Court from Dr. Harold Meyer, Commissioner of the OHSAA, in a telephone conversation. Diadiun concluded appellant had lied in the Franklin County court proceedings.

The important question is whether Ted Diadiun wrote his article with "actual malice" towards appellant, as required by the *New York Times* case. In other words, did Diadiun write his article knowing it was false or with reckless disregard of whether it was false or not.

At the conclusion of appellant's evidence in the court below, there was no evidence before the court that Diadiun wrote the article with "actual malice" against the appellant.

Rather, the evidence indicated Diadiun wrote the article based on his personal observations as to what occurred at the wrestling match and what appellant testified to at the OHSAA hearing in addition to what Dr. Meyer had indicated to him about appellant's testimony in court. Based on these sources of information, Diadiun expressed his opinion as to the statements of appellant in the Franklin County court proceedings. Appellant believed his article to be true.

I am of the opinion the article written by Diadiun falls within the limits of the court's words at page 269 of the *New York Times* case:

"It is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions, and this opportunity is to be afforded for vigorous advocacy no less than abstract discussion."

I would affirm the judgment of the trial court.

/s/ ROBERT E. COOK

JUDGMENT ENTRY ERRATA

(Filed December 21, 1979)

Case No. 6-287

IN THE COURT OF APPEALS
ELEVENTH DISTRICTSTATE OF OHIO,
LAKE COUNTY, ss.

MICHAEL MILKOVICH,
Appellant,

vs.

LORAIN JOURNAL CO., et al.,
Appellees.

JUDGMENT ENTRY ERRATA

It coming to the attention of this Court that an error exists on Page 3, Line 2 of the Dissenting Opinion of Judge Robert E. Cook, dated December 3, 1979, this Court sua sponte orders the Clerk of the Court of Lake County to strike the word "appellant" at said place in said Dissenting Opinion and, by pen, insert the word "appellee".

/s/ ROBERT E. COOK
Judge
For the Court

**ORDER OF THE SUPREME COURT OF OHIO
DISMISSING THE APPEAL**

(Dated March 20, 1980)

No. 80-107

THE SUPREME COURT OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS

MICHAEL MILKOVICH,
Appellee,
vs.LORAIN JOURNAL COMPANY, et al.,
Appellants.

**APPEAL FROM THE COURT OF APPEALS
FOR LAKE COUNTY**

This cause, here on appeal as of right from the Court of Appeals for Lake County, was considered in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Lake County for entry.

A44

**ORDER OF THE SUPREME COURT OF OHIO OVER-
RULING THE MOTION FOR AN ORDER DI-
RECTING THE COURT OF APPEALS TO
CERTIFY ITS RECORD**

(Dated March 20, 1980)

No. 80-107

THE SUPREME COURT OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS

MICHAEL MILKOVICH,
Appellee,

vs.

THE LORAIN JOURNAL COMPANY, et al.,
Appellants.

MOTION FOR AN ORDER DIRECTING
THE COURT OF APPEALS
FOR LAKE COUNTY
TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

A45

**ORDER OF THE SUPREME COURT OF OHIO
DENYING REHEARING**

(Dated April 25, 1980)

No. 80-107

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS

MICHAEL MILKOVICH,
Appellee,

vs.

LORAIN JOURNAL COMPANY, et al.,
Appellants.

REHEARING

It is ordered by the court that rehearing in this case is
denied.

**OPINION OF THE COURT OF COMMON PLEAS,
LAKE COUNTY, OHIO**

(Filed September 4, 1981)

Case No. 75 CIV 0301

IN THE COURT OF COMMON PLEAS
LAKE COUNTY, OHIO

MICHAEL MILKOVICH, SR.,
Plaintiff,

vs.

THE NEWS HERALD, et al.,
Defendants.

OPINION

Defendant The News Herald of Willoughby, Ohio, published a column written by Ted Diadiun on January 8, 1975, containing the following headline, "Maple beat the law with the 'big lie' ". The article takes issue with plaintiff, Michael Milkovich, head wrestling coach for the Maple Heights Wrestling team, specifically criticizing him for his actions and conduct while coaching one of the team's matches.

The incident in question arose on February 9, 1974, when Maple Heights was wrestling Mentor. During the match, a controversial call ignited a disturbance involving both teams. A subsequent hearing conducted by the Ohio High School Athletic Association (OHSAA) resulted in censoring Milkovich, placing the Maple Heights team on probation and declaring the Maple Heights team in-

eligible from further state wrestling tournament competition that year.

Thereafter, concerned parents and involved wrestlers filed a law suit in Franklin County Common Pleas Court claiming that they had been denied due process at the OHSAA hearing. Mr. Milkovich was a witness at this proceeding, though he was not a party thereto. Upon completion, the court held that complainants were in fact denied due process. Further, the court ordered that the suspension previously imposed by the OHSAA Board be removed. *Barrett v. Ohio High School Athletic Assn.*, Case No. 74 Civ 09-3390 (Ct. Common Pleas, Franklin County, Ohio, January 7, 1975).

It is undisputed that Diadiun attended both the wrestling match and the OHSAA hearing, and that he did not attend the due process proceeding in Franklin County. Nor did Diadiun read the transcript of the latter or review the actual opinion rendered by the Franklin County judge. Rather, he wrote a column based upon his own recollection of what had transpired at the two events he attended, supplemented by an oral accounting of what was testified to at the Franklin County proceedings by Dr. Harold Meyer, who also attended the OHSAA hearing.

In the article in question, Diadiun suggests that Milkovich "misrepresent[ed]" the facts as presented to the OHSAA Board of Control and that when testifying before Judge Paul W. Martin of the Franklin County Court of Common Pleas he "apparently had [the] version of the incident polished and reconstructed, and the judge apparently believed [him]." In closing the article, Diadiun alleges to the fact that anyone who "attended . . . knows in his heart that Milkovich . . . lied at the hearing after having given his solemn oath to tell the truth."

A libel suit, captioned *Milkovich v. The News Herald, et al.*, Case No. 75 CIV 301 (Ct. C.P. Lake County, Ohio), was filed naming Ted Diadiun, The News Herald of Willoughby, Ohio, and the latter's parent corporation as defendants. At the close of plaintiff's case in chief, defendants' moved for a directed verdict. This Court's predecessor, in granting the Motion for a Directed Verdict, wrote that construing the evidence most strongly in plaintiff's favor, such evidence "fails to establish by clear and convincing proof that the article . . . was published with knowledge of its falsity or in reckless disregard of the truth."

Plaintiff appealed the decision to the 11th District Court of Appeals of Ohio wherein the granting of the directed verdict was reversed and the cause remanded to this Court. *Milkovich v. Lorain Journal Co.*, 65 Ohio App. 2d 143, 416 N.E. 2d 662 (Ct. App. Lake County 1980).

Defendants then filed an appeal with the Ohio Supreme Court. In dismissing the appeal and denying defendants' Writ of Certiorari, the Court stated that no "substantial constitutional issue" was raised. Again a Writ of Certiorari was instituted, this time with the United States Supreme Court. This was subsequently denied. However, Mr. Justice Brennan issued a dissenting opinion, wherein he questioned the rationale of the 11th District Court of Appeals reversing the Lake County Court of Common Pleas and ordering the Court to reinstitute trial proceedings. *Lorain Journal Co., et al. v. Milkovich*, No. 80-100 (U. S. Sup. Ct. November 3, 1980).

In rendering its decision, the Court has considered the pleadings, the briefs, the applicable law and, through counsels' oral stipulation at the May 26, 1981, motion hear-

ing, the incorporation by reference of all the previously filed documentary evidence in testimonial form relative to this case.

The first trial Court made a determination that plaintiff Michael Milkovich was a public figure within the meaning of *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 154-55 (1967). This Court concurs in this finding.

The standard for reviewing defamation claims against public figures evolved from the landmark case of the *New York Times v. Sullivan*, 376 U.S. 254 (1964), where the United States Supreme Court held that the First Amendment of the United States Constitution,

prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' - that is with knowledge that it was false or with reckless disregard of whether it was false or not.

Id. 376 U.S. at 279-80.

As a public figure, plaintiff must sustain the burden of proving that the article's libelous statements were made with actual malice. Constitutional protection afforded under the *New York Times* standard, *supra*, does not extend to a calculated lie or a statement written with reckless disregard for its truthfulness. However, utterances which are honest though inaccurate, are afforded protection. *Garrison v. Louisiana*, 370 U.S. 64, 75 (1964). See generally, *Time Inc. v. Pope*, 401 U.S. 279 (1971).

Traditionally, opinions were afforded a qualified privilege in libel actions if they amounted to "fair comment" on matters of public concern. This shield has been expanded by subsequent case law.

Today, opinions based on disclosed facts, dealing with matters publicly known, are absolutely privileged.

As stated originally in *Gertz v. Welch*, 418 U.S. 323, 339-40 (1974),

[u]nder the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the consciences of judges and juries, but on the competition of other ideas.

See also *Hoag v. Charlotte Republican Tribune*, 5 Media L. Rptr. 1535, 1540 (Mich. Cir. Ct., Eaton County 1979).

Examining the applicable standard in cases similar to the one at bar, the Court finds that plaintiff, in order to successfully obtain a libel recovery, must establish that the article was published with actual malice. Particularly, he must set forth proof of convincing clarity that the publication was false or that the writer had serious doubts about its truth. This constitutes reckless disregard for the truth. See, *New York Times*, *supra* 376 U.S. at 286; *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968); *Beckley Newspapers v. Hanks*, 389 U.S. 81, 83 (1967).

When a suit involves a public figure and/or a public official, the plaintiff must sustain the burden of proving a calculated falsehood. *Curtis v. Butts*, 388 U.S. 130, 153 (1967).

Furthermore, a defendant, in accordance with the *New York Times* standard, is not required to have even a reasonable belief regarding the truth of his publication. Merely that the defendant had no actual knowledge of the article's falsity or that he entertained no serious doubts as to its truth, is sufficient to successfully defeat a defamation claim. *Garrison v. Louisiana*, 379 U.S. 64, 78-79 (1964).

The Supreme Court of the United States held that the "reckless component of the actual malice" standard is not to be inferred from defendant's simple failure to act in conformity with the conduct of a prudent or reasonable reporter. *St. Amant*, *supra*, 390 U.S. at 731. *Pierce v. Capital Cities Communications, Inc.*, 576 F. 2d 495, 508 (3rd Cir. 1978), *cert. denied*, 439 U.S. 861 (1978). As in the *New York Times* case, *supra*, negligence on the part of a defendant in failing to ascertain the accuracy of its copy will not sustain a finding of actual malice. Proof of actual malice entails more than the establishment of simple negligence. As emphasized in *St. Amant v. Thompson*, *supra*,

reckless conduct is not measured by whether a reasonably prudent man would have published or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.

Id., 390 U.S. at 731. Fallibility is a human characteristic. As such, even the most skilled are prone, on occasion, to unwittingly commit an error or misstate a fact. See also *Hoffman v. Washington Post Co.*, 433 F. Supp. 600, 605 (Wash. D.C. 1977).

Likewise, courts have held that expressions of the writer's opinion can be forthright and critical. The fact that an opinion article subjects the plaintiff to public ridicule will not support plaintiff's claim of libel. Where a writer expresses his own personal opinions about the actions of another, regardless of how unreasonable or vituperous they may be, they remain the views of the writer and cannot be the basis for a libel suit. *Hotchner v. Cas-*

tillo-Puche, 551 F. 2d 910, 913 (2d Cir. 1977), *cert. denied*, 434 U.S. 834 (1977); *See also*, *Gertz*, *supra*, 418 U.S. at 339-40; *Buckley v. Littell*, 539 F. 2d 882, 893 (2d Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977).

Use of the term "liar" in an article which challenges another's veracity was found by this Court, in several cases, to constitute an expression of opinion. As in *Bennett v. Transamerican Press*, 298 F. Supp. 1013 (S.D. Iowa C.D. 1969), a charge of "liar" levied against a legislator was held to be merely an expression of the writer's opinion and not libelous under the *New York Times* standard. Similarly, the Court of Appeals in Illinois has also ruled that use of the term liar, in the appropriate content, would not be libelous. *See Wade v. Sterling Gazette Co.*, 56 Ill. App. 2d 101 (1965).

Traditionally, courts have placed a premium on free debate. Erroneous opinions are inevitable. But even the erroneous opinion is to be tolerated in order that self censorship not prevail over robust public debate.

After carefully examining the article in question, the Court is in disagreement with plaintiff's contention that it is a statement of fact and not one of opinion. Both the tone, the choice of language and the article's editorial format leave no room for doubt that Mr. Diadiun's purpose was to convey a heartfelt editorial, albeit highly emotional. Nonetheless, this article falls within the realm of opinion, and not within the scope of a factual news account.

Mr. Diadiun's article presents a social commentary recapitulating three separate incidents: a wrestling match fracas, a subsequent proceeding before OHSAA and a due process hearing in the Franklin County Court of Common Pleas. The column is replete with phraseology expressing

Mr. Diadiun's personal views. The article speaks of lessons to be learned, of the preeminent position of educators, of the latter's function as role models, of the susceptibility of young people and also of whether "might makes right". Indicative of the Court's finding that the article constitutes editorial comment is Diadiun's utilization of the following language: "[i]f you're successful enough, and powerful enough, and can sound sincere enough, you stand an excellent chance of making the lie stand up"; "I was in the unique position of being the only non-involved party"; "[t]o anyone who was at the meet"; "But unfortunately, . . . [they] apparently had their version of the incident polished"; and finally "Anyone who attended the meet . . . knows in his heart that [they] . . . lied."

Plaintiffs next argue that even if the article is opinion, defendant's failure to disclose the facts upon which the column is based transforms it into a factual article, eliminating its privileged status. Plaintiff's statement of the law is accurate. However, the Court does not find that the facts support a finding that the author failed to fully disclose the basis upon which his opinions were formulated. *Accord*, *Pease v. Telegraph Publishing*, 7 Media Law Rptr. 1114, 1115-6 (New Hamp. 1981).

Mr. Diadiun states in the article that he attended and covered the wrestling match in question. He also was present at the OHSAA hearing. And while absent from the due process proceedings in Franklin County, he did obtain, first hand, a recounting from an observer by the name of Dr. Harold Meyer, who was also present at the OHSAA hearing.

Plaintiff, both in his brief and in Diadiun's depositions, raises the issue of Diadiun's awareness that the Franklin

County proceedings was a due process hearing and not a trial on the merits. While some confusion may have been present as to Diadiun's perception of these proceedings, this confusion was not conveyed in the article. Paragraph three of the article relates, without a doubt, that the sole issue before the Franklin County Court was the denial of due process.

Furthermore, a close reading of the Franklin County decision verifies only that Maple Heights High was found to have been denied particular procedural safeguards required by due process by the OHSAA hearings. That Court made no factual determination as to what transpired on the night in question. Wherefore, plaintiff's contentions that Diadiun's article was written with full knowledge that it conflicted with a judicial determination of the truth is not well taken.

The Court finds as a matter of law that the article in question is an editorial column. As such, the plaintiff cannot, within the confines of constitutional law, recover in a libel action.

Even assuming for the moment, that the privilege afforded is not applicable, plaintiff has failed to prove his case by the clear and convincing weight of the evidence standard, imposed on libel cases. *Gertz, supra*, 418 U.S. at 342; *New York Times, supra*, 376 U.S. at 285-86. It is plaintiff's burden to set forth the evidence he will introduce at trial substantiating his claims of constitutional malice. *Fadell v. Minneapolis Star & Tribune Co., Inc.*, 557 F. 2d 107, 108 (7th Cir. 1977), *cert. denied*, 434 U.S. 966 (1977); *Craig v. Moore*, 4 Med. L. Rptr. 1402 (Fla. Cir. Ct. Duval County 1978). See *Wasserman v. Time Inc.*, 424 F. 2d 920, 922 (D.C. Cir. 1970), *cert. denied*, 398 U.S. 940 (1970).

The issue of malice must be set forth by the plaintiff with convincing clarity. The Court, in applying this standard, is bound to examine only that evidence pertinent to the resolution of material questions of fact. Absent plaintiff's ability to persuade the trier of fact by presenting clear and convincing evidence regarding the issue of malice, movant would be entitled to a judgment as a matter of law. *Fadell, supra*, 557 F. 2d at 108; See *Dupler v. Mansfield Journal Co., Inc.*, 64 Ohio St. 2d 116, 413 N.E. 2d 1187 (1980); *Hahn v. Kotten*, 43 Ohio St. 2d 237, 331 N.E. 2d 713 (1975).

Furthermore, plaintiff cannot rest on mere allegations and arguments. Nor can he stand on the defense that disputes of nonmaterial fact conceivably could be resolved in plaintiff's favor. See generally *Thompson v. Evening Star Newspaper Co.*, 394 F. 2d 774 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 890 (1968).

Plaintiff's proof necessarily must consist of evidence of convincing clarity and of sufficient probative value to manifestly demonstrate on defendant's part a knowing falsity or a reckless disregard for the truth. *Bon Air Hotel, Inc. v. Time, Inc.*, 426 F. 2d 858 (5th Cir. 1970). In effect, the burden of proceeding forward shifts to the plaintiff to affirmatively demonstrate that he can document proof of actual malice at trial. *United Medical Laboratories v. Columbia Broadcasting System, Inc.*, 404 F. 2d 706 (9th Cir. 1968), *cert. denied*, 394 U.S. 921 (1969); *Drye v. Mansfield Journal Corp.*, 32 Ohio Misc. 70, 288 N.E. 2d 856 (Ct. Common Pleas, Richland County 1972).

Unlike the general civil practice that summary judgments should be sparingly granted, use of the summary judgment route in defamation cases is the rule rather than the exception. As was stated in *Washington Post Co. v. Keogh*, 365 F. 2d 965, 968 (D.C. Cir. 1966),

One of the purposes of the [New York Times] principle . . . is to prevent persons from being discouraged in the full and free exercise of their First Amendment rights The threat of being put to the defense of a lawsuit brought by a public official may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself, especially to the advocates of unpopular causes.

See also, *Guitar v. Westinghouse Electric Co.*, 396 F. Supp. 1042, 1053 (S.D.N.Y. 1975).

To require that these defendants incur the expense of a trial, in a matter where no clear and convincing proof of constitutional malice has been presented by documentary evidence in testimonial form, would be against the tenets of the *New York Times* doctrine. Clearly, such an abrogation contravenes the plethora of constitutional authority to the contrary. A plaintiff who is a public figure, must of necessity, make a more persuasive showing than that required of a private citizen in order to defeat a movant's motion for summary judgment. Plaintiff, in the instant cause of action, has not met this burden of proof. See, *Loeb v. New Times*, 497 F. Supp. 85 (S.D.N.Y. 1980).

The protection afforded the freedom of speech clause of the First Amendment was recently addressed by the United States Supreme Court in *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978). Therein the *Bellotti* court wrote,

[t]he freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of substantial punishment. . . . Freedom of discussion, if it would

fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period. *Thornhill v. Alabama*, 310 U.S. 88, 101-02 (1940).

In summary, in order for a Court to properly grant a motion for summary judgment, where privilege is involved, defendant needs to show that plaintiff has not alleged facts, which, if proven, would be sufficient to support his contention that defendants had acted with malice, both in the writing and in the printing of the article in question. Plaintiff's documentary evidence fails to substantiate the existence of actual malice by clear and convincing proof.

In the case at bar, two divergent interpretations of a series of distinct, yet intertwined, events are presented. In the process, a column was written expressing the view that plaintiff had lied while under oath testifying before a due process hearing in Franklin County. A close examination of that case, entitled *Barrett v. Ohio High School Athletic Association*, *supra*, underscores the point that no judicial determination or finding of fact was rendered. Nor did the Court of Common Pleas of Franklin County comment on the events or the actions undertaken by the litigants at bar. Rather, it was presented with and addressed only the issue of procedural due process. Absent this factual determination, plaintiff's proof of actual malice fails when measured against the required standard of clear and convincing proof.

This Court holds that defendant's Motion for Summary Judgment must be granted. This Court finds that the article in question constitutes editorial opinion. Further, the Court finds ample disclosure upon which defendant Diadiun bases his opinions. Therefore, this article is

afforded constitutional protection and cannot serve as the basis for a defamation suit.

Furthermore, were this Court to find that the article in question was predominately a factual one, summary judgment is still appropriate due to plaintiff's failure to establish a prima facie existence of actual malice. Applying the standard as outlined above to the facts in the instant case, and construing the same most strongly in the favor of the non-moving plaintiff, the Court finds that there is no quantum of evidence upon which a trier of fact could find proof of convincing clarity relative to the issue of actual malice.

Therefore, the Court finds that reasonable minds can come to one conclusion, said conclusion being adverse to the non-moving party. Accordingly, defendant's Motion for Summary Judgment is granted as a matter of law.

Exceptions are noted for the plaintiff.

Prevailing counsel shall prepare a Judgment Entry signed by counsel in accordance with this Court's Opinion.

/s/ JAMES W. JACKSON

Judge of the Court of Common Pleas

**JUDGMENT ENTRY OF THE COURT OF COMMON
PLEAS, LAKE COUNTY, OHIO GRANTING DE-
FENDANTS' MOTION FOR SUMMARY JUDG-
MENT**

(Filed September 28, 1981)

Case No. 75 CIV 0301

IN THE COURT OF COMMON PLEAS
LAKE COUNTY, OHIO

MICHAEL MILKOVICH, SR.,
Plaintiff,

vs.

THE NEWS HERALD, et al.,
Defendants.

JOURNAL ENTRY JUDGMENT

This cause came on to be heard by leave of court first obtained and pursuant to Ohio Civil Rule 56 upon the pleadings, the Defendant's Motion for Summary Judgment, the affidavits, depositions, stipulations of counsel, including the incorporation by reference of the previously filed documentary evidence in testimonial form relative to the case, and the briefs of counsel.

The Court being fully advised in the premises, finds in favor of the Defendants and finds that there is no genuine issue as to any material fact and that the Defendants' Motion for Summary Judgment should be and hereby is granted for the reasons set forth in the Opinion of the Court filed September 4, 1981, which is attached hereto,

A60

marked Exhibit A, and made a part hereof by reference as though fully rewritten herein.

Accordingly, judgment is rendered against the Plaintiff and in favor of the Defendants with costs of this action chargeable to the Plaintiff. It is so Ordered.

/s/ JAMES W. JACKSON
Judge

A61

**OPINION OF THE COURT OF APPEALS
OF LAKE COUNTY, OHIO**

(Filed October 3, 1983)

No. 9-012

COURT OF APPEALS OF OHIO,
ELEVENTH DISTRICT, COUNTY OF LAKE

MICHAEL MILKOVICH, SR.,
Plaintiff-Appellant,

vs.

THE NEWS-HERALD, *et al.*,
Defendants-Appellees.

OPINION

The record shows that an altercation occurred during a wrestling match on February 8, 1974 between Maple Heights High School and Mentor High School which caused a violent disturbance injuring several people. The Ohio High School Athletic Association (OHSAA) conducted a hearing, which resulted in censoring plaintiff, placing the Maple Heights team on probation and declaring Maple Heights ineligible for further state wrestling tournament competition that year.

Subsequently, parents and members of the wrestling team filed an action in Franklin County Common Pleas Court, which held that they were denied due process and ordered the suspension imposed by OHSAA removed.

Defendant, The News-Herald, published a column written by Ted Diadiun on January 8, 1975. The article was

critical of plaintiff, who was head wrestling coach at Maple Heights, for his actions and conduct while coaching one of the team's matches immediately prior to the foregoing incidents. Whereupon, plaintiff filed a libel action, which was tried to a jury in early 1979. At the close of plaintiff's evidence, the trial court directed a verdict for defendants on the ground that the evidence failed to show by clear and convincing proof that the article was published with actual malice.

Plaintiff appealed and the appellate court reversed on the basis that reasonable minds could find actual malice. [See *Milkovich v. Lorain Journal Co.* (1979), 65 Ohio App. 2d 143.] Thereafter, on remand, the trial court granted defendants' motion for summary judgment.

Plaintiff now asserts seven assignments of error as follows:

- "1. The Trial Court erred in granting Appellees' motion for summary judgment after this Court had mandated that the case be retried so that a jury could determine whether Appellees had acted with actual malice.
- "2. The Trial Court erred in granting Appellees' motion for summary judgment because there are genuine issues of material fact in dispute between the parties.
- "3. The Trial Court erred in granting Appellees' motion for summary judgment because appellees were not entitled to judgment as a matter of law.
- "4. The Trial Court erred in holding that Michael Milkovich was a public figure and that he is required to show actual malice before recovering for damage to his reputation.

- "5. The Trial Court erred in holding that the defamatory falsehoods published by Appellees about Michael Milkovich were constitutionally-protected opinions rather than assertions of fact or opinions stated without disclosing the underlying bases therefore.
- "6. The Trial Court erred in holding that Michael Milkovich had not demonstrated, by clear and convincing evidence, that Appellees had acted with actual malice in publishing false and defamatory statements about him when the same evidence was before the Trial Court that this Court has already held to be sufficient.
- "7. The Trial Court erred in granting Appellees' motion for summary judgment where Michael Milkovich presented evidence showing that Appellees had published false statements about him in violation of their duty, under Ohio law, to exercise reasonable care to avoid publishing such falsehoods and where Appellees denied having done so, thus creating a genuine issue of material fact."

As to plaintiff's first assignment of error, this court previously reversed the trial court's judgment and remanded the case for "further proceedings." Traditionally, "[b]y reversal, a judgment is made void, and the matters litigated in the case reversed, again become open for litigation between the same parties." *Hinton v. McNeil* (1832), 5 Ohio St. 509, 511. Hence, the trial court had the discretion to consider a motion for summary judgment as "further proceedings." Such proceedings could properly include a review of new issues not previously raised.

Therefore, plaintiff's first assignment of error is overruled.

Plaintiff's fourth and sixth assignments of error are interrelated and are considered together. It is well settled that newspaper articles concerning public figures or public officials, including false statements of fact, are not actionable unless published with actual malice. *New York Times v. Sullivan* (1964), 376 U.S. 254; *Curtis Publishing Co. v. Butts* (1967), 388 U.S. 130; *Dupler v. Mansfield Journal* (1980), 64 Ohio St. 2d 116. Actual malice is defined as knowledge that the statement is false or reckless disregard for the truth. *New York Times* at 279-280; *Dupler* at 119. Public figure is defined as one who, by reason of his achievements, secures public attention. *Gertz v. Robert Welch, Inc.* (1974), 418 U.S. 323.

The record shows that plaintiff is definitely a public figure. His outstanding record as a wrestling coach and leader in his profession is well documented in the transcript. Similar to *Butts, supra*, Milkovich has a list of impressive credentials, which conclusively demonstrates his prominence. Consequently, as a public figure, plaintiff was required to establish by clear and convincing evidence that the statements were published with actual malice, that is, with knowledge of their falsity or reckless disregard of the truth. *Dupler, supra*, at 119. Summary judgment is proper when the court finds there is no genuine issue of material fact concerning the existence of actual malice.

The "knowledge of falsity" for actual malice requires the publisher to have actually known the article was false when published. *Sullivan, supra*, at 279-280. A publication's falsity alone is insufficient to establish actual malice. In this case, there is no evidence of actual knowledge, and particularly no evidence of a clear and convincing quality.

The "reckless disregard of the truth" aspect of actual malice requires the publisher to have either a high degree

of awareness of the probability that a statement is false, or serious doubts of the truth thereof. The fact that the court previously found in plaintiff's favor does not make such finding a conclusive determination of truth. Consequently, this alone does not make defendant's assertion that plaintiff lied reach the level of actual malice.

The evidence in this case, when construed most strongly for plaintiff, does not show the article was published with actual malice as evidenced by a reckless disregard for the truth.

Thus, plaintiff's fourth and sixth assignments of error are overruled.

Plaintiff's fifth assignment of error is also not well taken. A statement of opinion encompasses a privilege which is not applicable to a statement of fact. The United States Supreme Court in *Gertz, supra*, at 339-340 stated:

"* * * Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues. * * *"

This privilege respecting statements of opinion is a qualified one, giving rise to an action in libel only when the article does not disclose the facts upon which the opinion is based. See, e.g., *Orr v. Argus-Press Co.* (5th Cir. 1978), 586 F.2d 1108, cert. denied (1979), 440 U.S. 960. Moreover, whether a publication constitutes an opinion in the constitutional sense is a question of law.

The trial court found as a matter of law the article in question is an editorial opinion. The trial court's rationale is set forth in its opinion as follows:

"Traditionally, courts have placed a premium on free debate. Erroneous opinions are inevitable. But even the erroneous opinion is to be tolerated in order that self censorship not prevail over robust public debate.

"After carefully examining the article in question, the Court is in disagreement with plaintiff's contention that it is a statement of fact and not one of opinion. Both the tone, the choice of language and the article's editorial format leave no room for doubt that Mr. Diadiun's purpose was to convey a heartfelt editorial, albeit highly emotional. Nonetheless, this article falls within the realm of opinion, and not within the scope of a factual news account.

"Mr. Diadiun's article presents a social commentary recapitulating three separate incidents: a wrestling match fracas, a subsequent proceeding before OHSAA and a due process hearing in the Franklin County Court of Common Pleas. The column is replete with phraseology, expressing Mr. Diadiun's personal views. The article speaks of lessons to be learned, of the preeminent position of educators, of the latter's function as role models, of the susceptibility of young people and also of whether 'might makes right'. Indicative of the Court's finding that the article constitutes editorial comment is Diadiun's utilization of the following language: '[i]f you're successful enough, and powerful enough, and can sound sincere enough, you stand an excellent chance of making the lie stand up'; 'I was in the unique position of being the only

non-involved party'; '[t]o anyone who was at the meet'; 'But unfortunately, . . . [they] apparently had their version of the incident polished', and finally 'Anyone who attended the meet . . . knows in his heart that [they] . . . lied.'

"Plaintiffs next argue that even if the article is opinion, defendant's failure to disclose the facts upon which the column is based transforms it into a factual article, eliminating its privileged status. Plaintiff's statement of the law is accurate. However, the Court does not find that the facts support a finding that the author failed to fully disclose the basis upon which his opinions were formulated. *Accord, Pease v. Telegraph Publishing*, 7 Media Law Rptr. 1114, 1115-6 (New Hamp. 1981).

"Mr. Diadiun states in the article that he attended and covered the wrestling match in question. He also was present at the OHSAA hearing. And while absent from the due process proceedings in Franklin County, he did obtain, first hand, a recounting for an observer by the name of Dr. Harold Meyer, who was also present at the OHSAA hearing."

The record supports the trial court's analysis. Moreover, the article, as an opinion, disclosed its underlying facts. The writer, as indicated above, referred to events and circumstances upon which he based his opinion. The article did not present a factual news account. Rather, it summarized the writer's ideas, opinions and conclusions derived collectively from a number of related events which were plainly referred to therein.

The article substantiates its nature and editorial purpose. It appears in the sports editorial column labeled "TD says". Further, it is presented by a highly opinion-

ated title, "Maple beat the law with the 'big lie'", which does not suggest a factual news account of a specific event, but instead presents the writer's personal opinion. Thus, the article is privileged as it constitutes a statement of opinion concerning publicly known matters and discloses the underlying facts which provide the basis for the opinions expressed in the article.

Therefore, plaintiff's fifth assignment of error is overruled.

Finally, plaintiff's second, third and seventh assignments of error are interrelated and are considered together. As applied to this case, Civ. R. 56(C) provides that summary judgment is proper when, after all the evidence is construed most strongly in favor of the plaintiff, reasonable minds can only conclude that the article in question is a constitutionally-protected opinion; that plaintiff is a public figure and that plaintiff has failed to raise a genuine issue of material fact to find actual malice under the applicable burden of proof.

After a complete review of the record, and construing the evidence most strongly for plaintiff, the court correctly determined that reasonable minds could only conclude the article qualified as a constitutionally-privileged opinion. Furthermore, the court found that plaintiff is a public figure and there is simply nothing in the record to the contrary. Consequently, as a public figure or a public official, he is required to present a genuine issue of material fact which would clearly and convincingly establish that the article was published with actual malice. *Dupler, supra*. The trial court correctly found that the record does not present such issue. Finally, the trial court correctly concluded that the article was a constitutionally-protected opinion. Therefore, the trial court properly granted summary judgment to defendants.

Accordingly, plaintiff's second, third and seventh assignments of error are overruled.

For the foregoing reasons, the judgment is affirmed.

Judgment affirmed.

/s/ ARCHER E. REILLY

REILLY, J., of the Tenth Appellate District, sitting by assignment in the Eleventh Appellate District.

COOK, P. J.,
FORD, J., Concur.

**JUDGMENT ENTRY OF THE COURT OF APPEALS
OF LAKE COUNTY, OHIO**

(Filed October 3, 1983)

No. 9-012

IN THE COURT OF APPEALS
ELEVENTH DISTRICT
STATE OF OHIO, COUNTY OF LAKE

MICHAEL MILKOVICH, SR.,
Appellant.

vs.

THE NEWS-HERALD, et al.,
Appellees.

JUDGMENT ENTRY

This cause came on to be heard upon the Record in the Trial Court, and was briefed and argued by counsel for the parties.

Upon consideration whereof, this Court finds no error prejudicial to the appellant and, therefore, the judgment of the Trial Court is affirmed. Each Assignment of Error was reviewed by the Court and disposed of as set forth in this Court's Opinion, which is incorporated herein by reference.

It is ordered that the costs shall be taxed against the appellant.

This Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Trial Court to carry this judgment into execution. A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

/s/ ARCHER E. REILLY

Judge (Tenth Appellate District, By Assignment) For the Court

A72

**JUDGMENT ENTRY OF THE SUPREME COURT
OF THE STATE OF OHIO**

(Dated December 31, 1984)

No. 83-1833

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS

MICHAEL MILKOVICH SR.,
Appellant,

vs.

THE NEWS-HERALD *et al.*,
Appellees.

MANDATE

To the Honorable Court of Common Pleas Within and
for the County of Lake, Ohio, Greeting:

The Supreme Court of Ohio commands you to proceed
without delay to carry the following judgment in this cause
into execution:

Judgment of the Court of Appeals is reversed and cause
remanded for the reasons set forth in the opinion rendered
herein.

A73

**ORDER OF THE SUPREME COURT OF THE STATE
OF OHIO DENYING PETITIONERS' MOTION
FOR REHEARING**

(Dated February 6, 1985)

Case No. 83-1833

THE SUPREME COURT OF OHIO
COLUMBUS

MICHAEL MILKOVICH, SR.,
Appellant,

vs.

NEWS HERALD *et al.*,
Appellees.

REHEARING

It is ordered by the court that rehearing in this case
is denied.

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR
HARD COPY AT THE TIME OF FILMING.
IF AND WHEN A BETTER COPY CAN BE
OBTAINED, A NEW FICHE WILL BE
ISSUED.

Maple beat the law with the 'big lie'

By TED DIADIUN

News-Herald Sports Writer
Yesterday in the Franklin County Common Pleas Court, Judge Paul Martin overturned an Ohio High School Athletic Assn. decision to suspend the Maple Heights wrestling team from this year's state tournament.

It's not final yet — the judge granted Maple only a temporary injunction against the ruling — but unless the judge acts much more quickly than he did in this decision (he has been deliberating since a Nov. 8 hearing) the temporary injunction will allow Maple to compete in the tournament and make any further discussion meaningless.

But there is something much more important involved here than whether Maple was denied

TED

Says



due process by the OHSA, the basis of the temporary injunction.

When a person takes on a job in a school, whether it be as a teacher, coach, administrator

or even maintenance worker, it is well to remember that his primary job is that of educator.

There is scarcely a person concerned with school who doesn't leave his mark in some way on the young people who pass his way — many are the lessons taken away from school by students which weren't learned from a lesson plan or out of a book. They come from personal experiences with and observations of their superiors and peers, from watching actions and reactions.

Such a lesson was learned (or relearned) yesterday by the student body of Maple Heights High School, and by anyone who attended the Maple-Mentor wrestling meet of last Feb. 8.

Please turn to page 20

Milkovich takes aim at Columbus

COLUMBUS, Ohio (AP) — Maple Heights wrestling Coach Mike Milkovich says his team will be shooting for an unprecedented 11th state wrestling title following a judge's ruling yesterday allowing the team to compete.

Judge Paul Martin granted the high school a temporary injunction. The injunction stops the Ohio High School Athletic Association from enforcing a suspension against the team.

"We're all happy at Maple Heights," the coach said. "I don't know whether we'll win or not, but I know the kids have something to shoot for."

... Diadiun says Maple told a lie

(Continued from Page 35)

A lesson which, sadly, in view of the events of the past year, is well they learned early.

It is simply this: If you get in a jam, lie your way out.

If you're successful enough, and powerful enough, and can sound sincere enough, you stand an excellent chance of making the lie stand up, regardless of what really happened.

The teachers responsible were mainly head Maple wrestling coach Mike Milkovich and former superintendent of schools H. Donald Scott.

and the Milkovich-Scott version presented to the board.

Any resemblance between the two occurrences is purely coincidental.

To anyone who was at the meet, it need only be said that the Maple coach's wild gestures during the events leading up to the brawl were passed off by the two as "stunts," and that Milkovich claimed he was "powerless to control the crowd" before the melee.

Fortunately, it seemed at the time, the Milkovich-Scott version of the incident presented to the board of control had enough contradictions and obvious untruths so that the six board members were able to see through it.

Probably as much in distasteful reaction to the chicanery of the two officials as in displeasure

The OHSAA had suspended the team from the 1975 tournament after a hearing over a melee in a 1974 dual meet.

The Franklin County Common Pleas Court judge ruled that the association had not followed due process in the hearing.

"Accordingly," he ruled, "the suspension from the State High School Wrestling Tournament of the Maple Heights team is unconstitutional and hereby enjoined."

Carlisle Dollings, attorney for the association, said he could not comment on the decision until he had examined it and talked to the association. He declined to discuss the possibility of an appeal.

Commissioner Harold Meyer of the governor body of state scholastic sports was attending a National High School Federation winter meeting in Orlando, Fla., and could not be reached.

Maple Heights won an unprecedented 10th big school state wrestling championship last March after the Mustangs and visiting Mentor were involved in a regular season brawl.

Four Mentor wrestlers were hospitalized after the disturbance during a dual match at Maple Heights.

Following the incident, the OHSAA conducted a hearing before its state board of control and suspended the team from the 1975 tournament.

Last winter they were faced with a difficult situation. Milkovich's ranting from the side of the mat and egging the crowd on against the meet official and the opposing team backfired during a meet with Greater Cleveland Conference rival Mentor, and resulted in first the Maple Heights team, then many of the partisan crowd attacking the Mentor squad in a brawl which sent four Mentor wrestlers to the hospital.

Naturally, when Mentor protested to the governing body of high school sports, the OHSAA, the two men were called on the carpet to account for the incident.

But they declined to walk into the hearing and face up to their responsibilities, as one would hope a coach of Milkovich's accomplishments and reputation would do, and one would certainly expect from a man with the responsible position of superintendent of schools.

Instead they chose to come to the hearing and misrepresent the things that happened to the OHSAA Board of Control, attempting not only to convince the board of their own innocence, but, incredibly, shift the blame of the affair to Mentor.

I was among the 2,000-plus witnesses of the meet at which the trouble broke out, and I also attended the hearing before the OHSAA, so I was in a unique position of being the only non-involved party to observe both the meet itself

over the actual incident, the board then voted to suspend Maple from this year's tournament and to put Maple Heights, and both Milkovich and his son, Mike Jr. (the Maple Jaycee coach), on two-year probation.

But unfortunately, by the time the hearing before Judge Martin rolled around, Milkovich and Scott apparently had their version of the incident polished and reconstructed, and the judge apparently believed them.

"I can say that some of the stories told to the judge sounded pretty darned unfamiliar," said Dr. Harold Meyer, commissioner of the OHSAA, who attended the hearing. "It certainly sounded different from what they told us."

Nevertheless, the judge bought their story, and ruled in their favor.

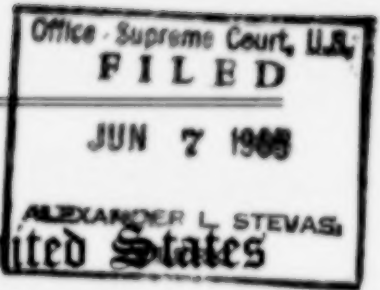
Anyone who attended the meet, whether he be from Maple Heights, Mentor, or impartial observer, knows in his heart that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth.

But they got away with it.

Is that the kind of lesson we want our young people learning from their high school administrators and coaches?

I think not.

No. 84-1731



IN THE
Supreme Court of the United States

October Term, 1984

THE LORAIN JOURNAL CO.,
THE NEWS-HERALD, and
J. THEODORE DIADIUN,
Petitioners,

v.

MICHAEL MILKOVICH, SR.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF OHIO

MOTION OF THE OHIO NEWSPAPER
ASSOCIATION FOR LEAVE TO FILE
AMICUS CURIAE BRIEF IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI AND
BRIEF AMICUS CURIAE IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI

Of Counsel:
MALCOLM L. MILLER
DANIEL G. HALE
GINGHER & CHRISTENSEN
311 East Broad Street
Columbus, Ohio 43215

PAUL R. GINGER
311 East Broad Street
Columbus, Ohio 43215
(614) 224-6285

*Counsel for Ohio
Newspaper Association*

1588

TABLE OF CONTENTS

	<u>PAGE</u>
Table of Authorities	ii
MOTION OF THE OHIO NEWSPAPER ASSOCIA- TION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI	1
BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI	4
Preliminary Statement	4
Summary of Argument	5
Argument In Support Of Reasons For Allowance of Writ of Certiorari	6
Conclusion	10

TABLE OF AUTHORITIES

	<u>PAGE</u>
Cases	
<i>Curtis Publishing Co. v. Butts</i> , 388 U.S. 130 (1967)	7, 8
<i>Gertz v. Robert Welch, Inc.</i> , 418 U.S. 323 (1974)	5, 7, 8, 10
<i>Greenbelt Cooperative Publishing Association</i> <i>v. Bresler</i> , 398 U.S. 6 (1970)	9
<i>Johnston v. Corinthian Television Corp.</i> , 583 P.2d 1101 (Okla. 1978)	8
<i>Milkovich v. The News-Herald</i> , 15 Ohio St. 3d 292, 473 N.E.2d 1191 (1974) ...	6, 7, 8, 9
<i>Old Dominion Branch No. 496 v. Austin</i> , 418 U.S. 264 (1974)	9
<i>Orr v. Argus-Press Co.</i> , 586 F.2d 1108 (6th Cir. 1978), <i>cert. den.</i> 440 U.S. 960 (1979) .	9
<i>Rosenblatt v. Baer</i> , 383 U.S. 75 (1966)	8, 9
<i>Wolston v. Reader's Digest Association, Inc.</i> , 443 U.S. 157 (1979)	8
Constitutional Provisions	
U.S. Const. amend I	7
Other Authorities	
Restatement (Second) of Torts § 566 (1977)	9

No. 84-1731

IN THE
Supreme Court of the United States

October Term, 1984

THE LORAIN JOURNAL CO.,
THE NEWS-HERALD, and
J. THEODORE DIADIUN,
Petitioners,

v.

MICHAEL MILKOVICH, SR.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF OHIO

**MOTION OF THE OHIO NEWSPAPER
ASSOCIATION FOR LEAVE TO FILE
AMICUS CURIAE BRIEF IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI**

The Ohio Newspaper Association hereby respectfully moves the Court for leave to file the attached brief *amicus curiae* in support of the petition for writ of certiorari in this case. The consent of counsel for the petitioners has been obtained, but the Ohio Newspaper Association has been unable to obtain the consent of counsel for respondent.

The Ohio Newspaper Association (herein "ONA") is a non-profit corporation organized and existing under the laws of the State of Ohio. Its membership consists of approximately 250 daily and weekly newspapers in Ohio, representing the major proportion of the circulation of newspapers in this state.

The ONA was organized to promote the best interests of its publishers and their readers. It has appeared as *amicus curiae* representing the interests of its membership in Ohio and federal courts, including a previous appearance in this case before this Court. By design, the ONA's structure keeps it in contact with the membership on a variety of points of legal as well as operational interests. The ONA feels, therefore, that it is in a unique position to represent the concerns of the collective Ohio press in this matter.

It is from that perspective that the ONA voices its support for this Court's granting the petition for a writ of certiorari. The holding of the Ohio Supreme Court in this case that a nationally active and nationally acclaimed high school wrestling coach was neither a public figure nor a public official has left a great deal of uncertainty about what constitutes a public figure or a public official in libel actions in the State of Ohio. In addition, by holding that the article in issue did not constitute protected opinion without enumerating any legal rationale, the Ohio Supreme Court has created confusion and hesitancy regarding what constitutes opinion in Ohio.

These holdings will inevitably have a chilling effect on Ohio's newspapers' First Amendment rights of freedom of the press by creating a significant amount of self-censorship. The decision that respondent is neither a public figure nor a public official in Ohio will seriously constrain the press when reporting matters of public interest. Further, the Ohio Supreme Court's failure to enumerate what legal standards apply to determine opinion from assertions of fact strikes at the very heart of the importance of free debate in our society as pronounced by this Court over many years.

Thus, the ONA asks leave of this Court to file its *amicus curiae* brief in support of the petition for a writ of certiorari. Even while recognizing this Court's heavy case load, we nevertheless believe and respectfully represent that the uncertainty created by the decision appealed from is damaging to the public interest and, if followed, will restrain the working press in the fulfillment of its First Amendment responsibilities. Resolution of this issue will have significant consequences for the Ohio press which

No. 84-1731

IN THE
Supreme Court of the United States

October Term, 1984

THE LORAIN JOURNAL CO.,
THE NEWS-HERALD, and
J. THEODORE DIADIUN,
Petitioners,

v.

MICHAEL MILKOVICH, SR.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF OHIO

**MOTION OF THE OHIO NEWSPAPER
ASSOCIATION FOR LEAVE TO FILE
AMICUS CURIAE BRIEF IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI**

The Ohio Newspaper Association hereby respectfully moves the Court for leave to file the attached brief *amicus curiae* in support of the petition for writ of certiorari in this case. The consent of counsel for the petitioners has been obtained, but the Ohio Newspaper Association has been unable to obtain the consent of counsel for respondent.

The Ohio Newspaper Association (herein "ONA") is a non-profit corporation organized and existing under the laws of the State of Ohio. Its membership consists of approximately 250 daily and weekly newspapers in Ohio, representing the major proportion of the circulation of newspapers in this state.

The ONA was organized to promote the best interests of its publishers and their readers. It has appeared as *amicus curiae* representing the interests of its membership in Ohio and federal courts, including a previous appearance in this case before this Court. By design, the ONA's structure keeps it in contact with the membership on a variety of points of legal as well as operational interests. The ONA feels, therefore, that it is in a unique position to represent the concerns of the collective Ohio press in this matter.

It is from that perspective that the ONA voices its support for this Court's granting the petition for a writ of certiorari. The holding of the Ohio Supreme Court in this case that a nationally active and nationally acclaimed high school wrestling coach was neither a public figure nor a public official has left a great deal of uncertainty about what constitutes a public figure or a public official in libel actions in the State of Ohio. In addition, by holding that the article in issue did not constitute protected opinion without enumerating any legal rationale, the Ohio Supreme Court has created confusion and hesitancy regarding what constitutes opinion in Ohio.

These holdings will inevitably have a chilling effect on Ohio's newspapers' First Amendment rights of freedom of the press by creating a significant amount of self-censorship. The decision that respondent is neither a public figure nor a public official in Ohio will seriously constrain the press when reporting matters of public interest. Further, the Ohio Supreme Court's failure to enumerate what legal standards apply to determine opinion from assertions of fact strikes at the very heart of the importance of free debate in our society as pronounced by this Court over many years.

Thus, the ONA asks leave of this Court to file its *amicus curiae* brief in support of the petition for a writ of certiorari. Even while recognizing this Court's heavy case load, we nevertheless believe and respectfully represent that the uncertainty created by the decision appealed from is damaging to the public interest and, if followed, will restrain the working press in the fulfillment of its First Amendment responsibilities. Resolution of this issue will have significant consequences for the Ohio press which

provides news and information to the general public. The ONA hopes that its desire to present the concerns of those most seriously affected will provide assistance to the Court in resolving the constitutional issues which appear in this case.

Respectfully submitted,

PAUL R. GINGER
311 East Broad Street
Columbus, Ohio 43215
(614) 224- 6285

Of Counsel:
MALCOLM L. MILLER
DANIEL G. HALE
GINGER & CHRISTENSEN
311 East Broad Street
Columbus, Ohio 43215

*Counsel for Ohio
Newspaper Association*

Dated: June 5, 1985

No. 84-1731

IN THE
Supreme Court of the United States

October Term, 1984

THE LORAIN JOURNAL CO.,
 THE NEWS-HERALD, and
 J. THEODORE DIADIUN,
Petitioners,

v.

MICHAEL MILKOVICH, SR.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
 TO THE SUPREME COURT OF THE STATE OF OHIO

**BRIEF AMICUS CURIAE IN SUPPORT OF
 PETITION FOR WRIT OF CERTIORARI**

PRELIMINARY STATEMENT

The Ohio Newspaper Association, as *amicus curiae* in support of the petition for writ of certiorari in this case, agrees with and adopts those matters presented by petitioners as required by Rule 21 of this Court to be set out in advance of argument amplifying the reasons relied on for the allowance of the writ.

SUMMARY OF ARGUMENT

1. A public high school wrestling coach and teacher with national and local prominence is a public figure under the test of *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).
2. Such a wrestling coach and teacher is also a public official for purposes of determining liability based upon alleged defamation in a newspaper article.
3. Absent actual malice, a newspaper article in which the author discloses the facts upon which the article is based is opinion protected by the First Amendment.

ARGUMENT IN SUPPORT OF REASONS FOR ALLOWANCE OF WRIT OF CERTIORARI

The Ohio Newspaper Association ("ONA") urges this Court to grant a writ of certiorari in this case to correct the decision of the Ohio Supreme Court and to protect the Ohio press's ability to remain free and robust. The three key issues in determining the press's potential liability in defamation actions have each been addressed by the Ohio Supreme Court in *Milkovich v. The News-Herald*, 15 Ohio St. 3d 292, 473 N.E.2d 1191 (1974), and each has been resolved in a way that the press must speak with such a degree of care that the decision effectively acts as a restraint. The decision appealed from holds that a nationally and locally prominent high school wrestling coach and teacher is (1) neither a public figure, (2) nor a public official, and (3) that an article concerning his involvement in a raucous wrestling match and his veracity in subsequent testimony concerning that event does not amount to protected opinion. Each of those determinations would alone be sufficient cause to prompt the attention of this Court, but all three together in one decision cries out for correction.

The facts of the case are well-known and well-documented, and there is little dispute about them. Several of them, though, have especial significance to the ONA. First, the respondent-plaintiff, Michael Milkovich, Sr., is a wrestling coach in a large Ohio high school, and his teams had consistently been among the best in Ohio's state championships. (In fact, they were seeking their eleventh consecutive state championship. See, Petitioner's Petition for Writ of Certiorari at A76 therein.) Second, respondent not only sought reknown in his field, but he also both traded on it by promoting his own wrestling program as "Ohio's Number One High School Coach" (R. 641) and succeeded in attaining it as his long list of awards and accomplishments demonstrates (R. 588-651). Finally, the precipitating wrestling match, the suspension of both respondent and his high school team from state tournament competition, and the subsequent (unrelated) litigation involving those events were surely matters of concern in the local sporting world and community-at-large.

Yet, the Ohio Supreme Court in *Milkovich* found respondent neither occupied a position of persuasive power or influence nor thrust himself into the forefront of a controversy to influence its decision. It is difficult to imagine, however, how a man who tried so hard and succeeded so well at becoming well-known and who testified in support of regaining his well-known team's eligibility for state championship competition can avoid being a public figure for First Amendment purposes. U.S. Const. amend. I (hereinafter "First Amendment"). That Court also concluded that respondent's purposeful self-advertising in connection with wrestling clinics did not matter in determining whether or not he was a public figure. *Milkovich*, 15 Ohio St. 3d at 297, 473 N.E.2d at 1195. One may well wonder what is required to satisfy that test when one who seeks fame and gets it is not considered a public figure in First Amendment litigation.

In finding that respondent was not a public figure, the Ohio Supreme Court found that this Court so limited its decision in *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967) in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) that similarities between *Milkovich* and *Butts* were wholly unpersuasive. Petitioner has documented the similarities between the two, and they need not be repeated here. Surely, though, a man with so many commendations and successes as respondent, and with such self-proclaimed notoriety cannot avoid the consequence of the success and notoriety he sought and achieved.

Finding that respondent is not a public figure works a hardship on the Ohio press. Even without trying to extract general principles from the Ohio Supreme Court decision and applying them to walks of life other than high school coaching and teaching, the case imposes severe restraints on what the Ohio press can say about its public school coaches, teachers and administrators. Another court has said the following in the context of making a public official determination:

[W]e can think of no higher community involvement touching more families and carrying more public interest than the public school system. This includes the athletic program.

Johnston v. Corinthian Television Corp., 583 P.2d 1101, 1103 (Okla. 1978). Surely press reports concerning those who are prominently responsible for those important community events involve public figures.¹

The ONA also believes that respondent should have been held to be a public official by the Ohio court. That court provided no real clue to its holding on this issue except to say that "the facts of the instant case are insufficient" to make respondent a public official, that the *Johnston* decision would "unduly exaggerate" this Court's decision in *Rosenblatt v. Baer*, 383 U.S. 75 (1966), and that it was "unpersuaded" that *Rosenblatt's* definition applied to respondent. *Milkovich*, 15 Ohio St. 3d at 297, 473 N.E.2d at 1195-1196. The effect of such a conclusion raises substantial doubt amongst the Ohio press over who is a public official.

The conflict that now exists between the two decisions by the Supreme Courts of Oklahoma and Ohio should be resolved by this Court in favor of the Oklahoma decision. This *amicus curiae* firmly believes that *Johnston's* holding that a public school coach is a public official is much more in keeping with *Rosenblatt* than is *Milkovich's* decision that he is not. The ONA can think of few other positions than those of public school teachers and coaches which have "such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it." *Rosenblatt*, 383 U.S. 86. See, *Johnston*, *supra*.

While elaborating on its standard for determining public official status, this Court said the following:

The [public] employee's position must be one which would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy.

¹The Ohio Supreme Court also appears to find that *Butts* was significantly undermined by *Gertz*. See, *Milkovich*, 15 Ohio St. 3d 295-297, 473 N.E.2d at 1193-1195. The ONA finds no such disapproval and believes that *Butts* would be decided similarly if reconsidered today. See, *Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157, 164 (1979).

Rosenblatt, 383 U.S. at 87 n. 13. Public school teachers and coaches surely satisfy that standard, especially so when they occupy the highly visible position of high school coach. Beyond that generality, however, this coach in particular—who sought out the notoriety he achieved—had invited "public scrutiny."

Finally, the Ohio court's finding that the article in question comprised "factual assertions as a matter of law" should be corrected. *Milkovich*, 15 Ohio St. 3d at 298, 473 N.E.2d at 1196-1197. This aspect of the case presents a particularly onerous burden on the Ohio press since the Ohio Supreme Court said it had "not adopted any specific standard" on this issue and it "decline[d] to establish a *per se* rule" here. *Id.*

Such ambiguity begs to be clarified, and the ONA urges this Court to hear and determine that issue. In its decision, the Ohio court declined to accept the rationale of the United States Court of Appeals for the Sixth Circuit in *Orr v. Argus-Press Co.*, 586 F.2d 1108 (6th Cir. 1978), *cert. den.* 440 U.S. 960 (1979). The *Orr* court held that "a statement of opinion about matters which are publicly known is not defamatory." *Id.* at 1114. In so holding, the court adopted the rule of the Restatement (Second) of Torts which reads as follows:

A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion.

Restatement (Second) of Torts § 566 (1977). That rule, and several of its examples, are premised in part on decisions of this Court. See, *Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264 (1974), and *Greenbelt Cooperative Publishing Association v. Bresler*, 398 U.S. 6 (1970), and in this instance, not only did petitioners' article *not* imply undisclosed facts, it set them out as eye-witness testimony in part by the author and in part by quoted statements made to the author by the commissioner of the Ohio High School Athletic Association. See, Petitioners' Petition For A Writ Of Certiorari at A75-A77.) If such a complete dis-

closure of facts cannot satisfy the standards for opinion under Ohio Law, the press runs great risks with nearly every edition that goes to print.

CONCLUSION

Based upon all of the foregoing, this *amicus curiae* respectfully urges this Court to grant the petition for certiorari and to resolve these issues that cloud the operations of the Ohio press. As this Court has said, "the communications media are entitled to act on the assumption that public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them." *Gertz*, 418 U.S. at 345. That appears not to be the law in state court in Ohio now.

Respectfully submitted,

PAUL R. GINGHER
311 East Broad Street
Columbus, Ohio 43215
(614) 244-6285

*Counsel for Ohio
Newspaper Association*

Of Counsel:

MALCOM L. MILLER
DANIEL G. HALE
GINGER & CHRISTENSEN
311 East Broad Street
Columbus, Ohio 43215

Dated: June 5, 1985

84-1731

No.

Office - Supreme Court, U.S.
FILED
JUL 8 1985
ALEXANDER L. STEVENS,
CLERK.

In the Supreme Court of the United States

OCTOBER TERM, 1984

THE LORAIN JOURNAL CO.,
THE NEWS-HERALD,
and
J. THEODORE DIADIUN,
Petitioners,

v.

MICHAEL MILKOVICH, SR.,
Respondent.

**BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO**

BRENT L. ENGLISH (*Counsel of Record*)
611 Park Building
140 Euclid Avenue
Cleveland, Ohio 44114
Telephone (216) 781-9917
Attorney for Petitioner
Respondent

RONALD CULP, BOX 26, WORTHINGTON, OHIO 43085 (614) 846-7025

BEST AVAILABLE COPY

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF THE FACTS	1
A. The Facts	1
B. The Proceedings	4
REASONS FOR DENYING PETITIONERS'	
WRIT	7
I. THE OHIO SUPREME COURT PROPERLY DETERMINED THAT MICHAEL MILKOVICH WAS A PRIVATE PERSON FOR PURPOSES OF THE LAW OF DEFAMATION AND THAT HE THEREFORE NEED NOT SHOW ACTUAL MALICE TO RECOVER COMPENSATORY DAMAGES FOR INJURY TO HIS REPUTATION.	7
II. THE DEFAMATORY FALSEHOODS PUB- LISHED BY PETITIONERS WERE NOT MERE EX- PRESSIONS OF OPINION.	16
CONCLUSION	25
APPENDIX	A-1

TABLE OF AUTHORITIES

Cases

<i>Barrett, et al. v. Ohio High School Athletic Assn.</i> , Case No. 74-CIV-09-3390 (C.P. Fran. Co., 1974), <i>aff'd</i> , Case No. 74-AD-24 (Fran. Co. 1975)	1, 4
<i>Buckley v. Littell</i> , 539 F.2d 882 (2d Cir. 1976)	20
<i>Cianci v. New Times Publishing Co.</i> , 639 F.2d 34 (2d Cir. 1980)	21
<i>Curtis Publishing Company v. Butts</i> , 388 U.S. 130 (1967)	8
<i>Dunn & Bradstreet Inc. v. Greenmoss Builders, Inc.</i> , ____ U.S. ____, ____ S.Ct. ____, 53 U.S.L.W. 4866 (Case No. 83-18, June 26, 1985)	8, 16
<i>Economy Carpet Manufacturers and Distributors v. Better Business Bureau</i> , 361 So.2d 234 (La. 1978), <i>cert. denied</i> , 440 U.S. 915 (1975)	19
<i>Embers Supper Club v. Scripps-Howard Broad- casting Co.</i> , 9 Ohio St. 3d 22 (1984)	7
<i>Gertz v. Robert Welch, Inc.</i> , 418 U.S. 323 (1974)	7, 15, 17, 20
<i>Hotchner v. Castillo-Puche</i> , 551 F.2d 910 (2d Cir.), <i>cert. denied sub nom.</i> , <i>Hotchner v. Doubleday & Co.</i> , 434 U.S. 834 (1977)	21
<i>Hutchinson v. Proxmire</i> , 443 U.S. 111 (1979)	11
<i>Information Control Corp. v. Genesis One Com- puter Corp.</i> , 611 F.2d 781 (9th Cir. 1980)	21

<i>Mashburn v. Collin</i> , 355 So.2d 879 (La. 1977)	19
<i>Milkovich v. The News Herald, et al.</i> , 15 Ohio St. 3d 292 (1984)	6, 11, 18
<i>New York Times Co. v. Sullivan</i> , 376 U.S. 254 (1964)	8, 13
<i>Ollman v. Evans</i> , ____ U.S. ____, ____ S.Ct. ____, 53 U.S.L.W. 3837 (Case No. 84-1624, May 28, 1985)	17, 22
<i>Orr v. Argus-Press Co.</i> , 586 F.2d 1108 (6th Cir. 1978), <i>cert. denied</i> , 440 U.S. 960 (1979)	23
<i>Rosenblatt v. Baer</i> , 383 U.S. 75 (1966)	14, 16
<i>Time, Inc. v. Firestone</i> , 424 U.S. 448 (1976)	11
<i>Wolston v. Reader's Digest Assn., Inc.</i> , 443 U.S. 157 (1979)	10

Constitutional Provisions

United States Constitution, Amendment I	7, 17
---	-------

Other Authorities

Comment, <i>Development in the Law of Defamation</i> , 69 Harv. L. Rev. 875, 927 (1956)	19
Hill, <i>Defamation & Privacy Under the First Amendment</i> , 76 Colum.L.Rev. 1205, 1239 (1976)	17
Restatement (Second) of Torts, Section 566	24
Titus, <i>Statement of Fact Versus Statement of Opinion—A Spurious Dispute in Fair Com- ment</i> , 15 Vand. L. Rev. 1203 (1982)	19

STATEMENT OF THE FACTS

A. The Facts

1. This libel action arises from the publication of certain false and defamatory statements about the Respondent, Michael Milkovich, Sr., in the News Herald, a newspaper in Northeastern, Ohio. The libelous article, a copy of which is attached as an Appendix to this brief in opposition at A-1, was published on January 8, 1975 in the News Herald and was written by petitioner J. Theodore Diadiun. The News Herald is owned by petitioner The Lorain Journal Co.

2. The article purported to describe the outcome of a judicial hearing conducted by the Franklin County Court of Common Pleas (Columbus, Ohio) on a suit brought by Respondent and others seeking to overturn a decision of the Ohio High School Athletic Association (OHSAA) forbidding the Maple Heights wrestling team from participating in post-season tournament play. *Barrett, et al. v. Ohio High School Athletic Assn.*, Case No. 74-CIV-09-3390 (C.P. Fran. Co., 1974), *aff'd*, Case No. 74-AD-24 (Fran. Co. 1975). The OHSAA had suspended the Maple Heights, Ohio team, of which Respondent was the coach, for allegedly violating certain requirements of the Association in an altercation that arose at an interscholastic meet between the Maple Heights team and the Mentor, Ohio team on February 8, 1974. Respondent and others had challenged the suspension on due process grounds. An evidentiary hearing was conducted on November 8, 1974 by the court but the decision was delayed until January 7, 1975. On that day, Judge Paul Martin of the Court of Common Pleas of Franklin County, Ohio issued a preliminary injunction enjoining the Association from enforcing its suspension.

3. On the following day, January 8, 1975, Theodore Diadiun wrote and the News Herald published the article in question. Entitled "Maple Beat the Law With the 'Big Lie,'" the Petitioner alleged that there was a lesson to be learned in the court's decision:

It is simply this: If you get in a jam, lie your way out.

If you're successful enough, and powerful enough, and can sound sincere enough, you stand an excellent chance of making the lie stand up, regardless of what really happened.

The teachers responsible were mainly head Maple wrestling coach Mike Milkovich and former superintendent of schools H. Donald Scott.

Petitioners went on to contend that Respondent and others had "declined to walk into [a hearing held by OHSA] and face up to their responsibilities [in creating the altercation on February 8, 1974] as one would hope a coach of Milkovich's accomplishments and reputation would do . . . Indeed, they chose to come to the [OHSA] hearing and misrepresent the things that happened. . ."

Petitioners went on to say that

Fortunately, it seemed at the time, the Milkovich-Scott version of the incident presented to the board of control had enough contradictions and obvious untruths so that the six board members were able to see through it.

Probably as much in distasteful reaction to the chicanery of the two officials as in displeasure over the actual incident, the board then voted to suspend Maple from this year's tournament and to put Maple Heights, and

both Milkovich and his son, Mike Jr. (the Maple Jaycees [sic] coach), on two-year probation.

But unfortunately, by the time the hearing before Judge Martin rolled around, Milkovich and Scott apparently had their version of the incident polished and reconstructed, and the judge apparently believed them.

"I can say that some of the stories told to the judge sounded pretty darned unfamiliar," said Dr. Harold Meyer, commissioner of the OHSA, who attended the hearing. "It certainly sounded different from what they told us."

Nevertheless, the judge bought their story, and ruled in their favor.

Anyone who attended the meet, whether he be from Maple Heights, Mentor, or impartial observer, knows in his heart that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth. But they got away with it.

4. Petitioner Diadiun wrote the article described above without even being present at the evidentiary hearing held on November 8, 1974 (R. 1068). No other reporter from the News Herald was present at this hearing either (R. 1069). Petitioners never bothered to acquire a transcript of the testimony until well after the offending article was written and the instant case was pending. (R. 1079-1080).

5. Petitioner Diadiun contends that he relied exclusively on conversations with Dr. Harold Meyer concerning the events which transpired at the evidentiary hearing (R. 1068-1080). However, Dr. Meyer denies having spoken with Mr. Diadiun prior to the decision being

announced on January 7, 1975. (R. 1099). He further denies having told Mr. Diadiun anything attributed to him in the offending article (R. 1099-1109). He specifically denies that Respondent's testimony was inconsistent between the OHSAA administrative hearing and the subsequent judicial hearing. (R. 1106; 1132-1136). In short, Dr. Meyer expressly and specifically refutes Mr. Diadiun's story in every way.

6. Mr. Milkovich did nothing other than participate in the hearing held by OHSAA to investigate what occurred at the wrestling match on February 8, 1974 and to participate in *Barrett, et al. v. Ohio High School Athletic Assn.*, Case No. 74-CIV-09-3390 (C.P. Fran. Co., 1974) with regard to influencing the outcome of the issues involving the wrestling match. He was a successful, well-respected wrestling coach prior to the allegations that he lied under oath to get himself out of a jam. He has never achieved general fame or notoriety.

B. The Proceedings

1. On April 30, 1975, Michael Milkovich filed a complaint containing a jury demand against the News Herald and The Lorain Journal Co., as owner and publisher of The News Herald in the Court of Common Pleas of Lake County, Ohio. The complaint was subsequently amended to add J. Theodore Diadiun as a defendant.

2. Petitioners filed a motion for summary judgment and, on May 23, 1977, the trial court granted the motion in part and held that Respondent was a "public figure."

3. The action proceeded to trial by jury. After five days of trial and at the close of Respondent's evidence, the court granted Petitioners' motion for a directed verdict and dismissed the action.

4. Respondent appealed the trial court's directed verdict to the Ohio Court of Appeals, Eleventh Judicial District (Lake County, Ohio). In an opinion dated December 3, 1979, the Court of Appeals reversed the trial court's directed verdict and remanded the case for further proceedings. *Milkovich v. Lorain Journal Co.*, 65 Ohio App.2d 143 (1979).

5. On December 27, 1979, Petitioners appealed to the Ohio Supreme Court. The Ohio Supreme Court dismissed Petitioners' appeal on March 20, 1980. Petitioners' motion for rehearing was similarly denied on April 25, 1980.

6. Petitioners then sought a writ of certiorari from this Court on July 23, 1980. This Court denied certiorari. *Lorain Journal Co. v. Milkovich*, 449 U.S. 966 (1980).

7. The action was returned to the Lake County Common Pleas Court for further proceedings. On April 17, 1981, Petitioners filed a second motion for summary judgment with the trial court alleging for the first time that the assertions of fact complained of by Milkovich were just "expressions of opinion." The trial court erroneously granted Petitioners' second motion for summary judgment and dismissed the action.

8. On October 26, 1981, Milkovich appealed the trial court's decision to the Ohio Court of Appeals, Eleventh Judicial District. Milkovich challenged the determination that he was a public figure and contended that the assertion that he had lied under oath was in no way constitutionally privileged. In an opinion

dated October 3, 1983, the Court of Appeals affirmed Milkovich's status as a public figure and upheld the trial court's issuance of summary judgment.

9. On November 30, 1983, Milkovich appealed the Lake County Court of Appeal's decision to the Ohio Supreme Court. The Ohio Supreme Court granted Milkovich's motion to certify the record. In a decision dated December 31, 1984, the Ohio Supreme Court reversed, holding that Milkovich was neither a public figure nor a public official, and determined that the assertion that Milkovich had lied under oath was not privileged. The case was remanded to the trial court for trial consistent with the negligence standard adopted by the Ohio Supreme Court in *Embers Supper Club v. Scripps-Howard Broadcasting Co.*, 9 Ohio St. 3d 32 (1984). *Milkovich v. News Herald*, 15 Ohio St. 3d 292 (1984).

10. Petitioners filed, on January 9, 1985, a motion for rehearing which was denied on February 6, 1985.

11. Petitioners filed a Petition for a Writ of Certiorari on May 6, 1985.

REASONS FOR DENYING PETITIONERS' WRIT

I. THE OHIO SUPREME COURT PROPERLY DETERMINED THAT MICHAEL MILKOVICH WAS A PRIVATE PERSON FOR PURPOSES OF THE LAW OF DEFAMATION AND THAT HE THEREFORE NEED NOT SHOW ACTUAL MALICE TO RECOVER COMPENSATORY DAMAGES FOR INJURY TO HIS REPUTATION.

The Ohio Supreme Court correctly determined that Respondent was a private figure. A private figure in Ohio, consistent with *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974), need not show actual malice to recover compensatory damages for injury to reputation. *Embers Supper Club v. Scripps-Howard Broadcasting Co.*, 9 Ohio St. 3d 22 (1984). Rather, a private figure under Ohio law need only show simple negligence. *Ibid.*

Respondent's private figure status results from the undisputed fact that he did not enjoy general fame or notoriety nor did he voluntarily inject himself into, or allow himself to be drawn into, a particular public controversy. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 352 (1974). Respondent's sole involvement in the controversy that gave rise to this case was his truthful testimony in a court of law about events and circumstances that led to his probation and to the suspension of his high school wrestling team from post-season competition. As a result of this testimony, he was accused by Petitioners of having committed perjury. If these accusations are false, (which the evidence at trial would show beyond cavil) and if these accusations were at least negligently made, Respondent, under the precedents of this Court, and in strict accordance with the First Amendment to the United States Constitution, should

be permitted to recover those compensatory damages he can prove.¹ This is exactly what the Ohio Supreme Court held and there is no reason whatsoever for this Court to review that holding.

A. Respondent's Status As A Private Figure Is Fully Consonant With The Decisions Of This Court.

Petitioners are patently wrong in arguing that Respondent's status is controlled by *Curtis Publishing Company v. Butts*, 388 U.S. 130 (1967). *Butts* was the first case in which the actual malice standard announced in *New York Times v. Sullivan*, 376 U.S. 254 (1964) was applied to persons other than public officials. Mr. Butts was the athletic director of the University of Georgia. Curtis Publishing Company published an article in *Look* magazine alleging that Mr. Butts had given Georgia's football plays, defensive patterns, and other significant secrets about the Georgia football team to the coach of the University of Alabama one week before a game between those teams. 388 U.S. 130, 136 (1966). Butts denied these allegations and sued for compensatory and punitive damages. He won a jury verdict for both compensatory and punitive damages. *Id.* at 138. This Court, 5-4, reversed.

Justice Harlan's opinion for the majority focused on whether the actual malice standard of *New York Times v. Sullivan*, 376 U.S. 254 (1964) should be applied in such a case. The actual malice standard was held to apply to "public figures" like Butts who "commanded a substantial amount of independent public interest at

¹Respondent also seeks punitive damages and agrees that he must show actual malice in order to do so. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); cf. *Dunn & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, ____ U.S. ____, ____ S.Ct. ____, 53 U.S.L.W. 4866 (Case No. 83-18, June 26, 1985).

the time of the publication[]" and who "... had sufficient access to the means of counterargument to be able to 'expose through discussion the falsehoods and fallacies' of the defamatory statements." 388 U.S. at 154.

The decision is unfortunately less than clear as to exactly how Mr. Butts "had commanded sufficient public interest," what the public's interest was, and how he could or did gain "access to the means of counterargument. . ." that he was held to have. Thus, it is not clear that *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) altered *Butts* in any way other than to more cogently analyze the question of public figure status in a different factual context.

Gertz made it plain that simple accomplishment did not make a person a public figure. Instead, only

... an individual [who] achieve[s] such pervasive fame or notoriety ... becomes a public figure for all purposes and contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions.

418 U.S. 323, 352 (1974). This Court further explained that

[a]bsent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life. It is preferable to reduce the public-figure question to a meaningful context by looking to the

nature and extent of an individual's participation in the particular controversy giving rise to the defamation. (emphasis supplied).

418 U.S. 323, 352 (1974).

Petitioners avoid the fact that the record *sub judice* is devoid of evidence that Respondent did anything other than testify truthfully in a judicial proceeding. Respondent did not thrust himself into the forefront of any issue and, as a high school wrestling coach, cannot tenably be claimed to have special prominence in the affairs of society at large. He had no general or special access to the "means of counterargument" and was truly "dragged unwillingly into [a] controversy" in much the same manner as was the plaintiff in *Wolston v. Reader's Digest Assn., Inc.*, 443 U.S. 157, 166 (1979).

Petitioners focus on the superficial similarities in the fact patterns of *Butts* and the matter at bar (i.e. both were coaches). The record discloses that Respondent was merely a successful high school wrestling coach. Nowhere does the record reflect that Respondent, by dint of his position or otherwise, had anywhere near the position of power and influence as did Mr. Butts in Georgia. Moreover, this Court has made clear that, but for pervasive fame and notoriety, public figure status is achieved only by voluntarily injecting oneself into or otherwise being drawn into a particular public controversy. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1974). The benchmark in either case is whether a person "has assume[d] special prominence in the resolution of public questions." *Ibid.* Respondent unquestionably had never assumed "special prominence" in the resolution of any public question much less a dispute about a high school wrestling match in 1974.

It is, therefore, utter nonsense to argue, as Petitioners do, that "Ohio trial and appellate courts are precluded from relying on *Butts* to ascertain public figure status" by virtue of the Ohio Supreme Court's decision in *Milkovich*. (Petition at 13). Plainly Ohio trial and appellate courts are bound to follow all of this Court's pronouncements including those cases which have reexamined and refined *Butts*. It is, simply put, a red herring to argue that Ohio's judiciary is in limbo because the Ohio Supreme Court has interpreted *Gertz* in the same manner as have a plethora of other courts and in a manner fully consistent with this Court's latest pronouncements.

B. The Ohio Supreme Court Properly Applied This Court's Precedents In Concluding That Respondent Was A Private Figure.

Contrary to Petitioners' suggestion, the Ohio Supreme Court did not hold that *Gertz v. Robert Welch, Inc.*, 318 U.S. 323 (1974) "overruled" *Curtis Publishing Company v. Butts*, 388 U.S. 130 (1967). Rather, the Ohio Court declined Petitioners' invitation to woodenly apply the result in *Butts* to the case at bar where there were significant factual differences in the cases and significant refinements in the law made by this Court. In particular, the Ohio Supreme Court applied the standards from *Gertz* as amplified by the later cases of *Time, Inc. v. Firestone*, 424 U.S. 448 (1976), *Hutchinson v. Proxmire*, 443 U.S. 111 (1979) and *Wolston v. Reader's Digest Assn., Inc.*, 443 U.S. 157 (1979) as follows:

[W]e find that [holding *Milkovich* to be a public figure] . . . would require us to ignore the redefinition of the public figure status as enunciated in *Gertz* and its progeny. In applying the *Gertz* standard to the case *sub judice*, we hold

that Milkovich is not a public figure as that term is utilized in First Amendment analysis. While appellant may be an individual recognized and admired in his community for his coaching achievements, he does not occupy a position of persuasive power and influence by virtue of those achievements. By the same token, appellant's position in his community does not put him at the forefront of public controversies where he would attempt to exert influence over the resolution of those controversies. While appellant did become involved in a controversy surrounding the events during and subsequent to his team's wrestling match with Mentor High School, appellant never thrust himself to the forefront of that controversy in order to influence its decision. Furthermore, it cannot be said that appellant assumed the risks of public life through the advertisement of his wrestling clinics. If this were the case, then any widespread advertisement for purely business purposes could result in the classification of an individual as a public figure. Given the application of the public figure definition since *Gertz*, we find appellant's status to be akin to the status of the plaintiff in *Firestone*, *supra*, rather than the status of the athletic director in *Butts*, *supra*. *Milkovich*, 15 Ohio St. 3d at 296.

Petitioners' unhappiness with this analysis reveals fundamental misunderstanding of the plain meaning of *Gertz*. Petitioners urge that because Respondent had been successful as a high school wrestling coach, he, *a fortiori*, had become a public figure, presumably for all purposes (Petition at 14-15). This position is directly

contradicted by *Gertz*. Moreover, this Court noted in *Gertz* that it "... would not lightly assume that a citizen's participation in community and professional affairs renders him a public figure for all purposes." 418 U.S. 323, 352 (1974). But this is exactly what Petitioners urge.

Petitioners also suggest that Respondent "affirmatively thrust himself into both the creation and resolution of the matter" that gave rise to the defamatory article being published. (Petition at 15). Of course, they know this is false and the Ohio Supreme Court expressly found that Respondent did no such thing. 15 Ohio St. 3d at 296.

The record shows that Respondent merely testified truthfully about the events that led to the suspension of himself and his wrestling team by the Ohio High School Athletic Association. This cannot, as a matter of law, be sufficient to amount to voluntarily injecting oneself into a particular public controversy giving rise to public figure status.

C. The Ohio Supreme Court Properly Determined that Respondent Was Not A "Public Official" As That Term Has Been Defined In *New York Times Co. v. Sullivan* and Its Progeny.

Almost as an afterthought, Petitioners argue that Respondent should have been classed as a "public official" because he was employed by a public school system in Ohio as a high school wrestling coach. The Ohio Supreme Court rejected this contention out of hand and this Court's precedents made it clear that it was unequivocally correct in doing so.

In *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), this Court held that certain "public officials"

could not recover damages for publication of a defamatory falsehood relating to their official conduct absent proof of actual malice. *Id.* at 283. There the Plaintiff-Respondent was an elected commissioner of the City of Montgomery, Alabama whose duties included police supervision. The New York Times Company published an advertisement that incorrectly described certain police actions in Montgomery. The Court determined that this publication was critical of Mr. Sullivan in his official capacity and thus the actual malice standard should apply. *Ibid.*

However, this Court specifically reserved a determination of "how far down into the lower ranks of governmental employees the 'public official' designation would extend for purposes of this rule." 376 U.S. at 283, N.23 (1964). In *Rosenblatt v. Baer*, 383 U.S. 75 (1966), the Court reached the question again. Noting that "[n]o precise lines need be drawn for the purposes of this case," *Id.* at 85, the Court focused on the rationale of the actual malice standard which was, in part, to promote the "strong interest in debate about those persons who are in a position significantly to influence the resolution of those issues." *Ibid.* Thus, the Court held that "'public official' designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs." 383 U.S. at 85. The Court went on to explain that

[w]here a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all governmental

employees, . . . the *New York Times* malice standards apply.

Id. at 86. In a footnote, the Court explained further that the "employee's position must be one which would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy." 383 U.S. at 86-87, N. 13.

Petitioners do not suggest how a mere high school wrestling coach occupies such a prominent position that his qualifications and performance are of special interest to the public other than to argue that Respondent had a "rather significant responsibility for and control over educating young people, impressionable athletes. . ." (Petition at 16). If a high school wrestling coach who interacts with "impressionable athletes" is a public official, then it should follow that any first grade teacher, school bus driver, or other similarly situated public employee would likewise be a "public official." This, of course, would eviscerate the right of a very significant percentage of Americans to protection of their reputations which "would virtually disregard society's interest in protecting reputation." *Rosenblatt v. Baer*, 383 U.S. 75, 87, N.13 (1966).

While Petitioners seem unable to recognize it, this Court has long recognized that defamation actions involving the press require an "accommodation of the competing values at stake." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 348 (1974). Thus, there is a "legitimate state interest underlying the law of libel [which is] compensation of individuals for the harm inflicted on them by defamatory falsehoods" *Id.* at 341. The "individual's right to protection of his own good name reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any de-

cent system of ordered liberty" *Id.* at 341, citing *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (J. Stewart, concurring). As Chief Justice Berger recently observed, "the great rights guaranteed by the First Amendment carry with them certain responsibilities as well." *Dunn & Bradstreet Inc. v. Greenmoss Builders, Inc.*, ____ U.S. ____, ____ S.Ct. ____, 53 U.S.L.W. 4866, 4870 (Case No. 83-18, June 26, 1985) (concurring). These precious interests would be ill served if every public employee from a janitor on up could be construed to be a "public official" for purposes of the law of defamation.

II. THE DEFAMATORY FALSEHOODS PUBLISHED BY PETITIONERS WERE NOT MERE EXPRESSIONS OF OPINION.

The Ohio Supreme Court properly characterized the defamatory falsehoods published about Respondent as assertions of fact and not as absolutely protected "heartfelt" opinion. A brief passage in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) gave rise in this case (and has been relied on in nearly every other recent defamation case) to claims that defamatory falsehoods are merely expressions of opinion entitled to absolute constitutional protection. The passage in *Gertz*, which is clearly *dicta*, reads as follows:

Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.

418 U.S. at 339-340. Justice Rehnquist has only very recently noted that

lower courts have seized upon the word "opinion" in the second sentence [of the above

quote from *Gertz*] to solve with a meat axe a very subtle and difficult question, totally oblivious "of the rich and complex history of the struggle of the common law to deal with this problem." Hill, *Defamation & Privacy Under the First Amendment*, 76 Colum.L.Rev. 1205, 1239 (1976).

Ollman v. Evans, ____ U.S. ____, ____ S.Ct. ____, 53 U.S.L.W. 3837 (Case No. 84-1624, May 28, 1985).

Petitioners in the case at bar urge adoption of the "meat axe" approach, *i.e.* ignore the plain import of the article in question and shield nearly any utterance, no matter how pernicious and false, from a suit for libel purportedly because of the First Amendment. The Ohio Supreme Court, appreciating fully the requirements of the First Amendment and the concomitant need to accommodate "a legitimate state interest underlying the law of libel [which is] compensation of individuals for the harm inflicted . . . by defamatory falsehoods," *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974), had no difficulty whatsoever reaching the conclusion that the assertions about Respondent were not entitled to constitutional protection:²

We find that the statements in issue are factual assertions as a matter of law and are not constitutionally protected as the opinions of the writer. Nothing in the article effectively precautions the reader that the author's statements are merely his considered opinion. The plain import of the author's assertions is that

²However, the Ohio Supreme Court wisely refused to adopt a "*per se* rule in determining what constitutes a protected opinion or a potentially redressable assertion of fact." 15 Ohio St. 3d 293, 298 (1984).

Milkovich, *inter alia*, committed the crime of perjury in a court of law.

Milkovich, 15 Ohio St. 3d at 298-299.

A. No matter How the Objectionable Statements Are Analyzed, the Inescapable Conclusion Is That They Are False Assertions of Fact and Not Constitutionally Protected Expressions of Opinion.

In many cases, unlike the one at bar, the distinction as to whether a particular statement is "opinion" entitled to constitutional protection or is an actionable assertion of fact is difficult to make. A number of analytical approaches have been developed. However, no matter how the following statements are analyzed, the inescapable conclusion reached is that Petitioners accused Mr. Milkovich of lying under oath:

. . . Many are the lessons taken away from school by students which weren't learned from a lesson plan or a book . . . Such a lesson was learned (or relearned) yesterday by the student body of Maple Heights High School, and by anyone who attended the Maple-Mentor wrestling meet of last Feb. 8. A lesson which, sadly, in view of the events of the past year, is well they learned early. It is simply this: *If you get in a jam, lie your way out. If you're successful enough, you stand an excellent chance of making the lie stand up, regardless of what really happened. The teachers responsible were mainly head Maple Heights wrestling coach Mike Milkovich . . .*

Anyone who attended the meet, whether he be from Maple Heights, Mentor, or impartial observer, knows in his heart that Milkovich . . .

lied at the hearing after . . . having given his solemn oath to tell the truth. But [he] got away with it. Is that the kind of lesson we want our young people learning from their high school . . . coaches? I think not. (emphasis supplied).

One approach to making the opinion-fact distinction has been to analyze the particular statement in terms of how an ordinary and reasonable person would view it:

[A]lthough difficult to state in abstract terms, as a practical matter, the crucial difference between statement and fact and opinion depends upon whether ordinary persons hearing or reading the matter complained of would be likely to understand it as an expression of the speaker's or writer's opinion, or as a statement of existing fact . . . An expression of opinion occurs when the maker of the comment states the facts on which his opinion of the plaintiff is based and then expresses a comment as to the plaintiff's conduct, qualifications, or character . . . Criticism is privileged as fair comment only when the facts on which it is based are truly stated. . .

Mashburn v. Collin, 355 So.2d 879, 885 (La. 1977); *Economy Carpet Manufacturers and Distributors v. Better Business Bureau*, 361 So.2d 234 (La. 1978), cert. denied, 440 U.S. 915 (1975). This is an approach that has long been used to analyze the applicability of the common law privilege of fair comment. Comment, *Development in the Law of Defamation*, 69 Harv. L. Rev. 875, 927 (1956); Titus, *Statement of Fact Versus Statement of Opinion—A Spurious Dispute in Fair Comment*, 15 Vand. L. Rev. 1203 (1982). An ordinary person reading the above quoted article about Mr.

Milkovich could reach no other conclusion than that he lied under oath to get himself "out of a jam." If this assertion is false, a fact easily demonstrated, Petitioners must answer for the corresponding damage to Respondent's well-deserved reputation.

Another approach has been to determine if the language used has a definite meaning in the context in which it is used. In *Buckley v. Littell*, 539 F.2d 882 (2d Cir. 1976), two statements were analyzed using this approach. The court concluded that a description of Mr. Buckley as a "fellow fascist traveler" was non-actionable because the phrase could be variously interpreted and "because of the tremendous imprecision of the meaning and usage of those terms in the realm of political debate." *Id.* at 893. On the other hand, the Court found that an assertion that Mr. Buckley lied about others and libeled them was "constitutionally and . . . tortiously defamatory" since "there is no constitutional value in false statements of fact." *Id.* at 896, citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974).

In the case at bar, precisely as in *Buckley*, the assertions complained are "constitutionally and tortiously defamatory" since they are assertions having definite, indeed unequivocal, meanings.

Other courts have evaluated particular statements to see if the assertions are empirically provable. The Second Circuit used this approach in *Buckley v. Littell*, 539 F.2d 882 (2d Cir. 1976) in conjunction with the textual analysis described above. It concluded that words and phrases such as "fellow traveler," "fascism," and "radical right" are "concepts whose content is so debatable, loose, and varying that they are unsusceptible to proof of truth or falsity." *Id.* at 893; *See, also*,

Hotchner v. Castillo-Puche, 551 F.2d 910, 913 (2d Cir.), *cert. denied sub nom., Hotchner v. Doubleday & Co.*, 434 U.S. 834 (1977). In the case at bar, however, the truth or falsity of whether Respondent lied to get himself "out of a jam" is readily provable since the hearing at which he purportedly did this was of record.

The context in which an objectionable statement appears has also been considered in a number of instances. In *Information Control Corp. v. Genesis One Computer Corp.*, 611 F.2d 781 (9th Cir. 1980), the court adopted a three part inquiry: (1) Were any cautionary terms used? (2) How do the objectionable statements fit in context? and (3) What are the circumstances surrounding the publication? *Id.* at 783-784. By ". . . examin[ing] the statement in its totality in the context in which it was issued or published . . ." the true meaning of the article could be assessed. *Ibid.* In the case at bar, no cautionary statements were made, the context is not disputable, and the circumstances in which the statements were made do not suggest that the assertions that Mr. Milkovich lied after "having given his solemn oath to tell the truth" were merely opinions.

One of the most lucid and best reasoned judicial opinions concerning the distinction between fact and opinion, is *Cianci v. New Times Publishing Co.*, 639 F.2d 34 (2d Cir. 1980). Judge Friendly carefully reviewed various approaches to the question in the context of an article alleging that the mayor of Providence, Rhode Island was a rapist and had obstructed justice. He concluded that

[a] jury could find that the effect of the article was not simply to convey the idea that Cianci was a bad man unworthy of the confidence of the voters of Providence, but rather to produce a specific image of depraved conduct—

committing rape with the aid of trickery, drugs, and threats of death or serious injury, and the scuttling of a well rounded criminal charge by buying off a victim. . . To call such charges merely an expression of "opinion" would be to indulge in Humpty-Dumpty's use of language. We see not the slightest indication that the Supreme Court or this Court ever intended anything of the sort and much to demonstrate the contrary. *Id.* at 64.

A comprehensive analysis of the opinion-fact distinction was recently undertaken by the United States Court of Appeals for the District of Columbia Circuit in *Ollman v. Evans*, 750 F.2d 970 (D.C. Cir. 1984), *cert. denied*, ____ U.S. ____, ____ S.Ct. ____, 53 U.S.L.W. 3837 (Case No. 84-1524, May 28, 1985).³ There the court adopted a four part inquiry:

(1) analyze the common usage or meaning of the specific language of the challenged statement itself; (2) consider the statement's verifiability; (3) consider the full context of the article itself; and (4) consider the broader context or setting in which the article occurs.

Id. at 979. As set out above, the challenged statements herein do not lend themselves under any method of analysis to the conclusion that they are protected opinion. Thus, there is no reason to review the Ohio Supreme Court's eminently sensible decision.

The majority opinion in *Ollman* contains a useful discussion which helps point up the wisdom of the Ohio Supreme Court's decision. The majority observed that

³The court, sitting *en banc*, issued seven opinions which together comprise 69 pages in volume 750 of *Federal Reporter 2d*.

[w]hile courts are divided in their methods of distinguishing between assertions of fact and expressions of opinion, they are universally agreed that the task is a difficult one. Clearly, . . . paradigm examples of statements of fact [exist] . . . [which include] assertions that describe present or past conditions capable of being known through sense impressions . . . At the other extreme are evaluative statements reflecting the author's political, moral, or aesthetic views, not the author's sense perceptions.

Id. at 978. The case at bar presents one of the "paradigm examples of statements of fact." Petitioners expressly alleged that Respondent lied under oath. This assertion is readily verifiable by comparing his testimony at both hearings. This case, therefore, is not even a close call on the opinion-fact distinction. Since the objectionable statements are plainly assertions of fact, the Ohio Supreme Court was right in holding that Petitioners could not tenably assert a constitutionally-based privilege in the case at bar.

B. The Decision of the Ohio Supreme Court Is Fully Consonant With the Decision of the United States Court of Appeals for the Sixth Circuit in *Orr v. Argus-Press Company*, 586 F.2d 1108 (6th Cir. 1978).

Petitioners' transparent attempt to create a conflict between the decision in the case at bar and a prior decision of the Sixth Circuit should be rejected as frivolous. A number of courts have recognized that even obvious expressions of opinion can be actionable if the existence of undisclosed facts is implied which are the basis for the opinion. One such case is *Orr v. Argus-Press Co.*, 586

F.2d 1108 (6th Cir. 1978), *cert. denied*, 440 U.S. 960 (1979), which recognized and applied the Restatement (Second) of Torts, Section 566. A *sine qua non* of this analysis, however, is that the statement(s) complained of be an expression of opinion and *not* an assertion of fact. Thus, as the court in *Ollman v. Evans*, 750 F.2d 970, 984 (D.C. App. 1984) said,

[a]fter deciding that a particular statement is opinion rather than fact, courts often undertake a second mode of analysis before wrapping the statement in the mantle of the First Amendment's opinion privilege. Relying upon the Restatement (Second) of Torts Sec. 566, the courts consider whether the opinion implies the existence of undisclosed facts as the basis for opinion. If the opinion implied factual assertions, courts have held that it should not receive the benefit of First Amendment protection as an opinion.

The result in *Orr v. Argus-Press Co.*, *supra*, is consistent with the method of analysis described above and is furthermore definitely not in conflict with the result in the case *sub judice*. The Sixth Circuit in *Orr* determined that the statements complained of were clearly opinion and that the opinions stated were not actionable because the underlying facts were fully disclosed. *Id.* at 1115.⁴ In the case at bar, the statements complained of are paradigm examples of factual assertions. Thus, the

⁴Orr, an attorney and a builder, conceded the truth of facts in a story about his being charged with 34 counts of fraud in connection with solicitations for investments in a shopping mall. He nevertheless complained of a newspaper's characterization of the charges as "alleged swindle" and of his conduct as "a phony shopping mall scheme."

question of whether the underlying facts were sufficiently disclosed was not, and need not have been, reached.

Accordingly, there is no conflict between the result or the rationale in *Orr* and the result and reasoning in *Milkovich*. The claimed "conflict" perceived by Petitioners in these decisions is wholly illusory.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the Ohio Supreme Court should be denied.

Respectfully submitted,

BRENT L. ENGLISH, *Counsel of Record*
140 Euclid Avenue
611 Park Building
Cleveland, Ohio 44114
(216) 781-9917
Attorney for Respondent

Maple beat the law with the 'big lie'

By TED DIADIUN
News-Herald Sports Writer

Yesterday in the Franklin County Common Pleas Court, Judge Paul Martin overturned an Ohio High School Athletic Assn. decision to suspend the Maple Heights wrestling team from this year's state tournament.

It's not final yet — the judge granted Maple only a temporary injunction against the ruling — but unless the judge acts much more quickly than he did in this decision (he has been deliberating since a Nov. 8 hearing) the temporary injunction will allow Maple to compete in the tournament and make any further discussion meaningless.

But there is something much more important involved here than whether Maple was denied

TED

Says



due process by the OHSAA, the basis of the temporary injunction.

When a person takes on a job in a school, whether it be as a teacher, coach, administrator

or even maintenance worker, it is well to remember that his primary job is that of educator.

There is scarcely a person concerned with school who doesn't leave his mark in some way on the young people who pass his way — many are the lessons taken away from school by students which weren't learned from a lesson plan or out of a book. They come from personal experiences with and observations of their superiors and peers, from watching actions and reactions.

Such a lesson was learned (or relearned) yesterday by the student body of Maple Heights High School, and by anyone who attended the Maple-Mentor wrestling meet of last Feb. 8.

Please turn to page 39

Milkovich takes aim at Columbus

COLUMBUS, Ohio (AP) — Maple Heights wrestling Coach Mike Milkovich says his team will be shooting for an unprecedented 11th state wrestling title following a judge's ruling yesterday allowing the team to compete.

Judge Paul Martin granted the high school a temporary injunction. The injunction stops the Ohio High School Athletic Association from enforcing a suspension against the team.

"We're all happy at Maple Heights," the coach said. "I don't know whether we'll win or not, but I know the kids have something to shoot for."

The OHSA had suspended the team from the 1975 tournament after a hearing over a melee in a 1974 dual meet.

The Franklin County Common Pleas Court judge ruled that the association had not followed due process in the hearing.

"Accordingly," he ruled, "the suspension from the State High School Wrestling Tournament of the Maple Heights team is unconstitutional and hereby enjoined."

Carlisle Dollings, attorney for the association, said he could not comment on the decision until he had examined it and talked to the association. He declined to discuss the possibility of an appeal.

Commissioner Harold Meyer of the governor body of state scholastic sports was attending a National High School Federation winter meeting in Orlando, Fla., and could not be reached.

Maple Heights won an unprecedented 10th big school state wrestling championship last March after the Mustangs and visiting Mentor were involved in a regular season brawl.

Four Mentor wrestlers were hospitalized after the disturbance during a dual match at Maple Heights.

Following the incident, the OHSA conducted a hearing before its state board of control and suspended the team from the 1975 tournament.

... Diadiun says Maple told a lie

(Continued from Page 35)

and the Milkovich-Scott version presented to the board.

Any resemblance between the two occurrences is purely coincidental.

It is simply this: If you get in a jam, lie your way out.

If you're successful enough, and powerful enough, and can sound sincere enough, you stand an excellent chance of making the lie stand up, regardless of what really happened.

The teachers responsible were mainly head Maple wrestling coach Mike Milkovich and former superintendent of schools H. Donald Scott.

To anyone who was at the meet, it need only be said that the Maple coach's wild gestures during the events leading up to the brawl were passed off by the two as "shrugs," and that Milkovich claimed he was "powerless to control the crowd" before the melee.

Fortunately, it seemed at the time, the Milkovich-Scott version of the incident presented to the board of control had enough contradictions and obvious untruths so that the six board members were able to see through it.

Probably as much in distasteful reaction to the chicanery of the two officials as in displeasure

Last winter they were faced with a difficult situation. Milkovich's ranting from the side of the mat and egging the crowd on against the meet official and the opposing team backfired during a meet with Greater Cleveland Conference rival Mentor, and resulted in first the Maple Heights team, then many of the partisan crowd attacking the Mentor squad in a brawl which sent four Mentor wrestlers to the hospital.

Naturally, when Mentor protested to the governing body of high school sports, the OHSA, the two men were called on the carpet to account for the incident.

But they declined to walk into the hearing and face up to their responsibilities, as one would hope a coach of Milkovich's accomplishments and reputation would do, and one would certainly expect from a man with the responsible position of superintendent of schools.

Instead they chose to come to the hearing and misrepresent the things that happened to the OHSA Board of Control, attempting not only to convince the board of their own innocence, but, incredibly, shift the blame of the affair to Mentor.

I was among the 2,000-plus witnesses of the meet at which the trouble broke out, and I also attended the hearing before the OHSA, so I was in a unique position of being the only non-involved party to observe both the meet itself

over the actual incident, the board then voted to suspend Maple from this year's tournament and to put Maple Heights, and both Milkovich and his son, Mike Jr. (the Maple Jaycee coach), on two-year probation.

But unfortunately, by the time the hearing before Judge Martin rolled around, Milkovich and Scott apparently had their version of the incident polished and reconstructed, and the judge apparently believed them.

"I can say that some of the stories told to the judge sounded pretty darned unfamiliar," said Dr. Harold Meyer, commissioner of the OHSA, who attended the hearing. "It certainly sounded different from what they told us."

Nevertheless, the judge bought their story, and ruled in their favor.

Anyone who attended the meet, whether he be from Maple Heights, Mentor, or impartial observer, knows in his heart that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth.

But they got away with it.

Is that the kind of lesson we want our young people learning from their high school administrators and coaches?

I think not.

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY
AT THE TIME OF FILMING. IF AND WHEN A
BETTER COPY CAN BE OBTAINED, A NEW FICHE
WILL BE ISSUED.

4

SUPREME COURT OF THE UNITED STATES

THE LORAIN JOURNAL CO. ET AL. v.
MICHAEL MILKOVICH, SR.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME
COURT OF OHIO

No. 84-1731. Decided November 4, 1985

The petition for writ of certiorari is denied.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins,
dissenting from the denial of certiorari.

Error and misstatement are inevitable in any scheme of truly free expression and debate. Because punishment of error may induce a cautious and restrained exercise of the freedoms of speech and press, the fruitful exercise of these essential freedoms requires a degree of "breathing space." *NAACP v. Button*, 371 U. S. 415, 433 (1963). Accordingly, "we protect some falsehood in order to protect speech that matters." *Gertz v. Robert Welch, Inc.* 418 U. S. 323, 341 (1974); see also *St. Amant v. Thompson*, 390 U. S. 727, 732 (1968). The *New York Times* actual malice standard defines the level of constitutional protection appropriate in the context of defamation of a public official. It rests on our "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open." *New York Times Co. v. Sullivan*, 376 U. S. 254, 270 (1964). In *Curtis Publishing Co. v. Butts*, 388 U. S. 132 (1966), the *New York Times* standard was extended to statements criticizing "public figures" because we recognized that "'public figures,' like 'public officials,' often play an influential role in ordering society" and that therefore "[o]ur citizenry has a legitimate and substantial interest in the conduct of such persons, and freedom of the press to engage in uninhibited debate about their involvement in public issues and events is as crucial as it is in the case of 'public officials.'" *Id.*, at 164

158

(Warren, C. J., concurring in result). In *Gertz v. Robert Welch, Inc.*, *supra*, we limited the applicability of the *New York Times* standard by holding that "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual." 418 U. S., at 374. (footnote omitted).

In this case, the Ohio Supreme Court found *Gertz* rather than *New York Times* applicable to respondent Milkovich's libel suit against petitioners. Ostensibly, then, the issue presented in this petition is simply the narrow one whether petitioners will be required to pay damages upon a showing of negligence or actual malice. However, by allowing damages to be awarded upon a showing of negligence, thereby diminishing the "breathing space" allowed for free expression in the *New York Times* case, the decision in *Gertz* exacerbated the likelihood of self-censorship with respect to reports concerning "private individuals." See *id.*, at 356-368 (BRENNAN, J., dissenting). Consequently, the rules we adopt to determine an individual's status as "public" or "private" powerfully affect the manner in which the press decides what to publish and, more importantly, what not to publish. In finding *New York Times* inapplicable, the Ohio Supreme Court read the "public official" and "public figure" doctrines in an exceptionally narrow way that is sure to restrict expression by the press in Ohio. Its decision is especially unfortunate in that it most effects reporting by local papers about the local controversies that constitute their primary content. Moreover, it is these local papers that are most coerced by the threat of libel damages since they can least afford the expense of damages awards. I therefore dissent and would grant certiorari in order to review this important constitutional question.

I

On February 9, 1974, a melee occurred at a high school wrestling match between Maple Heights and Mentor High

Schools; several wrestlers were injured, four of them requiring treatment at a hospital. The Ohio High School Athletic Association (OHSAA) conducted a hearing into the occurrence and censured Michael Milkovich, the Maple Heights coach and a teacher at the high school, for his conduct in encouraging the brawl. In addition, the OHSAA placed the Maple Heights team on probation for the school year and declared it ineligible to compete in the state wrestling tournament. Ted Diadiun, a sports columnist for the News-Herald of Willoughby, Ohio, attended and reported on both the match and the hearing.

A group of parents and wrestlers subsequently filed suit in Franklin County Common Pleas Court, alleging that the OHSAA had denied the team due process and seeking to reverse the declaration of ineligibility. Milkovich, though not a party to this lawsuit, appeared as a witness for the plaintiffs. On January 7, 1975, the Court held that the wrestling team had been denied due process and enjoined the team's suspension.

The next day, Diadiun wrote another column entitled "Maple beat the law with the 'big lie.'" Diadiun, who had not attended the court hearing, based the story on a description of the judicial proceedings given him by an OHSAA Commissioner and on his own recollection of the wrestling match and ensuing OHSAA hearing. After reporting the result of the lawsuit, the column stated "[b]ut there is something much more important involved here than whether Maple was denied due process by the OHSAA":

"When a person takes on a job in a school, whether it be as a teacher, coach, administrator or even maintenance worker, it is well to remember that his primary job is that of educator.

There is scarcely a person concerned with school who doesn't leave his mark in some way on the young people who pass his way—many are the lessons taken away from school by students which weren't learned from a

lesson plan or out of a book. They come from personal experiences with and observations of their superiors and peers, from watching actions and reactions.

Such a lesson was learned (or relearned) yesterday by the student body of Maple Heights, and by anyone who attended the Maple-Mentor wrestling meet of last Feb. 8.

A lesson which, sadly, in view of the events of the past year, is well they learned early.

It is simply this: If you get in a jam, lie your way out."

Diadiun stated that Milkovich and others had "misrepresented" the occurrences at the OHSAA hearing but that Milkovich's testimony "had enough contradictions and obvious untruths so that the six [OHSAA] board members were able to see through it." Diadiun then asserted that by the time the court hearing was held, Milkovich and a fellow witness "apparently had their version of the incident polished and reconstructed, and the judge apparently believed them." Diadiun opined that anyone who had attended the match "knows in his heart that Milkovich . . . lied at the hearing after . . . having given his solemn oath to tell the truth. But he got away with it." The column concluded:

"Is that the kind of lesson we want our young people learning from their high school administrators and coaches?

I think not."

Milkovich filed a libel action in state court against Diadiun, the News-Herald and the latter's parent, the Lorain Journal Company (petitioners). The Court denied petitioners' motion for summary judgment, but held that Milkovich was a public figure and, as such, was required to meet the standards established in *New York Times*. After five days of trial, at the close of Milkovich's case, petitioners moved for a directed verdict. The Court granted this motion, finding that Milkovich's evidence failed to establish actual malice as

a matter of law. The Ohio Court of Appeals reversed and remanded. It noted that the Common Pleas Court had accepted Milkovich's testimony, and ruled that this alone constituted sufficient evidence of actual malice to survive a motion for a directed verdict. The Ohio Supreme Court dismissed the appeal as raising no substantial constitutional question. This Court denied certiorari; I dissented. *Lorain Journal Co. v. Milkovich*, 449 U. S. 966 (1980).

On remand and before a new judge in the Common Pleas Court, petitioners filed a second motion for summary judgment. The Court reaffirmed the earlier holding that Milkovich was a public figure for purposes of the *New York Times* test and granted the motion. The Court held that Milkovich had failed to proffer sufficient evidence for a jury to conclude that Diadiun's column was published with actual malice. Alternatively, the Court found that the column constituted a privileged expression of opinion. This time the Ohio Court of Appeals affirmed, holding that the law of the case did not bar a second motion for summary judgment and agreeing with both of the trial court's particular holdings.

The Ohio Supreme Court reversed. Concluding "upon a careful review of the record" that Milkovich had not waived the right to challenge the earlier determination of his status as a public figure, the Court held that Milkovich was neither a "public official" nor a "public figure," and that the contents of the challenged article were facts which, if false, are not protected by the First Amendment. *Milkovich v. News-Herald*, 15 Ohio St. 3d 292, 473 N. E. 2d 1191, 1193-1196 (1984). This petition followed.

II

A

In *New York Times*, we had no occasion "to determine how far down into the lower ranks of government employees the 'public official' designation would extend" 376 U. S., at 283, n. 23. That question was addressed two terms later

in *Rosenblatt v. Baer*, 383 U. S. 75 (1966). Consistent with the premise of *New York Times* that "criticism of those responsible for government operations must be free, lest criticism of government itself be penalized," the Court in *Rosenblatt* held that "it is clear . . . that the 'public official' designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of government affairs." *Rosenblatt*, 383 U. S., at 85. We recognized there, however, that First Amendment protection cannot turn on formalistic tests of how "high" up the ladder a particular government employee stands. Rather, we determined, the focus must be on the nature of the public employee's function and the public's particular concern with his work. Accordingly, we held:

"[w]here a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees, . . . the *New York Times* malice standards apply." *Id.*, at 86 (emphasis added).

In *Rosenblatt* itself, we found this standard satisfied with respect to Baer, a supervisor of a county ski resort employed by and responsible to county commissioners.

The Ohio Court apparently read the language in *Rosenblatt* referring to government employees having "substantial responsibility for or control over the conduct of government affairs" as restricting the public official designation to officials who set governmental policy. This interpretation led it to conclude that finding a public employee like Milkovich to be a "public official" for purposes of defamation law "would unduly exaggerate the 'public official' designation beyond its original intendment." 473 N. E. 2d, at 1195-1196.

The Ohio Court has seriously misapprehended our decision in *Rosenblatt*. Indeed, the status of a public school teacher

as a "public official" for purposes of applying the *New York Times* rule follows *a fortiori* from the reasoning of the Court in *Rosenblatt*. As this Court noted in holding that the Equal Protection Clause does not bar a state from excluding aliens from teaching positions in the public schools, "public school teachers may be regarded as performing a task 'that goes to the heart of representative government.'" *Ambach v. Norwick*, 441 U. S. 68, 75-76 (1979) (quoting *Sugarman v. Dougall*, 413 U. S. 634, 647 (1973)). We have repeatedly recognized public schools as the nation's most important institution "in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests." *Id.*, at 77-78. See also, *San Antonio Independent School Dist. v. Rodriguez*, 411 U. S. 1, 29-30 (1973); *Wisconsin v. Yoder*, 406 U. S. 205, 213 (1972); *Brown v. Board of Education*, 347 U. S. 483, 493 (1954). The public school teacher is unquestionably the central figure in this institution:

"Within the public school system, teachers play a critical role in developing students' attitude toward government and understanding of the role of citizens in our society. Alone among employees of the system, teachers are in direct, day-to-day contact with students both in the classrooms and in the other varied activities of a modern school. In shaping the students' experience to achieve educational goals, teachers by necessity have wide discretion over the way course materials are communicated to students. They are responsible for presenting and explaining the subject matter in a way that is both comprehensible and inspiring. No amount of standardization of teaching materials or lesson plans can eliminate the personal qualities a teacher brings to bear in achieving these goals. Further, a teacher serves as a role model for his students, exerting a subtle but important influence over their perceptions and values. Thus, through both the presentation of course materials and

the example he sets, a teacher has an opportunity to influence the attitudes of students toward government, the political process, and a citizen's social responsibilities. This influence is crucial to the continued good health of a democracy." *Ambach*, 441 U. S., at 78-79 (footnotes omitted).¹

"[T]eachers . . . possess a high degree of responsibility and discretion in the fulfillment of a basic governmental obligation," *Bernal v. Fainter*, — U. S. —, 104 S. Ct. 2312, 2316 (1984),² and it is self-evident that "the public has an independent interest in the qualifications and performance" of those who teach in the public high schools that goes "beyond the general public interest in the qualifications and performance of all government employees," *Rosenblatt*, 383 U. S., at 86.³ Public school teachers thus fall squarely within the rationale of *New York Times* and *Rosenblatt*. Moreover, Diadiun's column challenged Milkovich's qualifications to teach young students in light of his conduct in connection with the Maple Heights/Mentor High School incident.

¹ JUSTICE BLACKMUN's dissent in *Ambach*, which I joined, expressed identical sentiments. See 441 U. S., at 88 ("One may speak proudly of the role model of the teacher, of his ability to mold young minds, of his inculcating force as to national ideals, and of his profound influence in the importation of society's values.").

² See also, *Board of Educ. v. Pico*, 457 U. S. 853, 864 (1981) (plurality); *Cabell v. Chavez-Salido*, 454 U. S. 432, 457, n. 8 (1982); *Zykan v. Warsaw Community School Corp.*, 631 F. 2d 1300, 1307 (CA7 1980).

³ This perfectly obvious conclusion has led at least one other court to reach a conclusion directly contrary to that of the Ohio Supreme Court. See *Johnston v. Corinthian Television Corp.*, 583 P. 2d 1101 (Okla. 1978) (grade school wrestling coach is "public official"). On the other hand, the state courts are in general disarray over the application of the *New York Times* standard to various other types of public employees. See Annot., *Libel and Slander: Who is a Public Official or Otherwise Within the Federal Constitutional Rule Requiring Public Officials to Show Actual Malice*, 19 A. L. R. 3d 1362 (1968 & 1985 Supp.). I would also grant certiorari to clarify the law in this regard.

It is precisely this type of discussion that *New York Times* and its progeny seek to protect.

B

The Ohio Supreme Court also held that Milkovich was not a "public figure" within the meaning of our decisions. It concluded that this Court has "retreated" from prior holdings and "redefined" public figure status to include only two narrowly defined classes of individuals. 473 N. E. 2d, at 1193-1195. Milkovich was found to fit in neither of these categories. *Ibid.* Here too, the state court misreads our decisions.

Our first encounter with the application of the *New York Times* test to non-government officials came in *Curtis Publishing Co. v. Butts, supra*. Butts actually decided two separate cases that were consolidated for review. In the first case, Butts, the athletic director at the University of Georgia⁴ and "a well known and respected figure in coaching ranks," *id.*, at 136, filed a libel action after the Saturday Evening Post published an article accusing Butts of having conspired to fix a football game with the University of Alabama. In the second case, Walker, a retired career Army officer who was prominent in the local community, sued the Associated Press after it filed a news dispatch giving an eyewitness account of a riot that erupted at the University of Mississippi when federal officers tried to enforce a court decree ordering the enrollment of James Meredith, a Black, as a student at the University. The report stated that Walker had taken command of the violent crowd and personally had led a charge against federal marshals. Although the Court in *Butts* failed to reach a consensus on the standard of liability

⁴Although the University of Georgia was a state university, Butts was employed by the Georgia Athletic Association, a private corporation, rather than by the State itself. His case thus did not raise the issue whether he was a "public official" for purposes of the *New York Times* test. See *Butts*, 388 U. S., at 135, and n. 2.

in suits brought by "public figures," seven members of the Court agreed that both Butts and Walker occupied this status.⁶ Justice Harlan explained in his plurality opinion:

"both Butts and Walker commanded a substantial amount of independent public interest at the time of the publications; both, in our opinion, would have been labeled 'public figures' under ordinary tort rules. . . . Butts may have attained this status by position alone and Walker by his purposeful activity amounting to a thrusting of his personality into the 'vortex' of an important public controversy, but both commanded sufficient continuing public interest and had sufficient access to the means of counterargument to be able 'to expose through discussion the falsehood and fallacies' of the defamatory statements." 388 U. S., at 154-155 (citations omitted).

As Justice Harlan's opinion indicates, the two cases considered in *Butts* exemplify alternative ways in which an individual may become a "public figure."⁷ Our subsequent cases have elaborated on this framework; we have held that "[i]n

⁶Justices Black and Douglas found it unnecessary to reach the issue consistent with their views that the First Amendment completely prohibits damages for libel. *Butts*, 388 U. S., at 170 (Black, J., dissenting); see also, *New York Times*, 376 U. S., at 293 (Black, J., concurring).

⁷Like Butts and Walker, Milkovich would be labeled a "public figure" under ordinary tort rules. See Prosser, *The Law of Torts* § 118, at 823-824 (4th ed. 1971); cf. *Stryker v. Republic Pictures Corp.*, 108 Cal. App. 2d 191, 238 P. 2d 670 (1951); *Molony v. Boy Comics Publishers*, 277 A. D. 166, 98 N. Y. S. 2d 119 (1950); *Wilson v. Brown*, 189 Misc. 79, 73 N. Y. S. 2d 587 (1947). Indeed, since in my opinion the scope of the constitutional privilege exceeds that of the privilege recognized at common law for reports about public figures, this fact alone should be sufficient to conclude that Milkovich is a "public figure." However, our subsequent decisions have treated the constitutional privilege without reference to the common law privilege, e. g., *Time, Inc. v. Firestone*, 424 U. S. 448, 453 (1976); *Wolston v. Reader's Digest Ass'n*, 443 U. S. 157, 165-169 (1979), and I therefore discuss Milkovich's status under our decisions without reference to the common law.

some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts," while, "[m]ore commonly, an individual voluntarily injects himself or is drawn into a particular controversy and thereby becomes a public figure for a limited range of issues." *Gertz*, 418 U. S., at 351; see also, *Time, Inc. v. Firestone*, 424 U. S. 448, 453 (1976); *Hutchinson v. Proxmire*, 443 U. S. 111, 134 (1979); *Wolston v. Reader's Digest Ass'n*, 443 U. S. 157, 164 (1979). However, the ultimate touchstone is always whether an individual has "assumed [a] role[] of especial prominence in the affairs of society [that] invite[s] attention and comment." *Gertz*, 418 U. S., at 345. These categories are merely descriptive; they are not, as the Ohio Supreme Court assumed, rigid, technical standards.

Petitioners spend most of their efforts attempting to analogize their case to that of Butts, and, indeed, the analogy is a strong one.⁷ A better argument can be made, however, that

⁷ Like Butts, Milkovich is "a well known and respected figure in coaching ranks." Indeed, he is unquestionably one of America's outstanding coaches. No other wrestling coach in America has achieved a record even close to his, a fact that has been recognized by numerous organizations. He has received the National Coach of the Year Award, the National Council of High School Coaches Award, the Scholastic Wrestling News National Achievement Award, a United States Wrestling Federation Award and numerous other gifts, proclamations and awards. He was inducted into the National Helms Hall of Fame, the Ohio Coaches Hall of Fame and received the Kent State University Hall of Fame Award. He has been cited in the Congressional Record and in the records of both the Ohio Senate and House of Representatives. He was similarly honored by the City of Cleveland and by his own City of Maple Heights, which celebrated "Mike Milkovich Day." He is a much sought after speaker by Coaches Associations throughout the United States and conducts wrestling clinics across the country under the aegis of various state and coaches organizations. See *Milkovich v. News-Herald*, 473 N. E. 2d, at 1194, and n. 1. Nor will it do simply to dismiss Milkovich's achievements as merely those of a high school coach. To be sure, as a general matter collegiate athletics obtains wider exposure than high school athletics. But with the exception of a few rather flamboyant figures who gain national exposure, most coaches—

Milkovich is a "public figure," like Walker, for purposes of this particular public controversy. Under this prong of "public figure" analysis, an individual who "voluntarily injects himself or is drawn into a particular public controversy" becomes a public figure with respect to public discussion of that controversy. *Gertz*, 418 U. S., at 351. Walker, for example, was deemed to have "thrust[] his personality into the 'vortex' of an important public controversy" by allegedly encouraging a riot. Milkovich's conduct was remarkably similar to Walker's—the allegedly libelous publication was inspired by a brawl that resulted in injuries to a number of students; Milkovich was alleged to have incited the fracas by egging on the crowd. While this fight did not compare in size or ferocity to the riots in which Walker participated at the University of Mississippi, it was a public controversy of concern to residents of the local community, as important to them as larger events are to the nation. Significantly, it was only in this community that the challenged article was circulated. See *Rosenblatt v. Baer*, 383 U. S., at 83 ("The subject matter may have been only of local interest, but at least here, where publication was addressed primarily to the interested community, that fact is constitutionally irrelevant."). The conclusion that Milkovich was a limited purpose public figure therefore seems quite straightforward.

The Ohio Supreme Court nevertheless concluded that Milkovich could not be classed a "public figure" because he "never thrust himself to the forefront of [the] controversy in order to influence its decision." 473 N. E. 2d, at 1195. However, the *New York Times* standard is not limited to discussion of individuals who deliberately seek to involve themselves in public issues to influence their outcome. Our decisions in this area rest at bottom on the need to protect public discussion about matters of legitimate public concern. See

like Butts—are unknown outside sports' circles and the local community. Milkovich is probably as well known both locally and in the wrestling community as was Butts in his respective circles.

Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., — U. S. —, —, 105 S. Ct. 2939, 2943–2946 (opinion of POWELL, J., joined by REHNQUIST and O'CONNOR, JJ.), —, 105 S. Ct., at 2948 (opinion of BURGER, C. J.), —, 105 S. Ct., at 2955–2962 (opinion of BRENNAN, J., joined by MARSHALL, BLACKMUN and STEVENS, JJ.). Although not every person connected to a public controversy is a "public figure," *Gertz, supra*, the *New York Times* protections do, and necessarily must, encompass the major figures around which a controversy rages. See *Wolston v. Reader's Digest Ass'n*, 443 U. S., at 167; see also, *Gertz*, 418 U. S., at 351 (public figure is one who "voluntarily injects himself or is drawn into a particular public controversy" (emphasis added)).⁸

We only recently acknowledged the "compelling" nature of the local interest in preventing violence and preserving discipline in the nation's high schools. *New Jersey v. T. L. O.*, — U. S. —, 105 S. Ct. 733, 748 (1985). A large fight between the students of two rival schools quite legitimately raises serious concerns for the entire community, particularly when, as here, it results in injury to students.⁹ The present

⁸ In *Wolston*, we held that although an individual's failure to appear before a grand jury investigating Soviet espionage was newsworthy, "[a] private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention." 443 U. S., at 167. Rather, we emphasized, "a court must focus on the nature and extent of an individual's participation in the particular controversy giving rise to the defamation." *Ibid.* (quoting *Gertz*, 418 U. S., at 352). Because it was "clear that [Wolston] played only a minor role in whatever public controversy there may have been concerning the investigation of Soviet espionage," he was held not to be a public figure. *Ibid.* Milkovich, on the other hand, was clearly the major player in this public controversy.

⁹ At one point in its opinion, the Ohio Supreme Court cited our holding in *Time, Inc. v. Firestone, supra*, that Mrs. Firestone's divorce was "not the sort of 'public controversy' referred to in *Gertz*." *Id.*, at 1194. The nature of the controversy here is completely different. This was not a private matter of public concern merely to gossips. Rather, the controversy

controversy centered primarily around the conduct of one man—Milkovich—in encouraging the fight; that conduct allegedly resulted in an OHSA hearing, his censure by that association and the disqualification of his team from eligibility in the state wrestling tournament.¹⁰ To say that Milkovich nevertheless was not a public figure for purposes of discussion about the controversy is simply nonsense.

III

The "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open," *New York Times*, 376 U. S., at 270, applies as much to debate in the local media about local issues as it does to debate in the national media over national issues. This Court's obligation to preserve the precious freedoms established in the First Amendment is every bit as strong in the context of a local paper's report of an incident at a local high school as it is in the context of an advertisement in one of the nation's largest newspapers supporting the struggle for racial freedom in the South. Because the decision below will stifle

in which Milkovich was involved was of immediate importance to parents and others in the community.

¹⁰These facts distinguish this case from *Hutchinson v. Proxmire*, *supra*. In *Hutchinson*, a hitherto unknown research scientist was allegedly libeled when Senator Proxmire awarded his government sponsor a "Golden Fleece of the Month Award" to publicize what the Senator perceived to be the most egregious examples of wasteful government spending. Proxmire argued that Hutchinson became a limited purpose public figure as a result of the publicity surrounding his being awarded a "Golden Fleece." We rejected this argument on the ground that "those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure." 443 U. S., at 135. The controversy surrounding the fight at the high school, on the other hand, was not created by Diadun's column. The event itself created a stir, leading to a hearing, censure of Milkovich and disqualification of his team. Diadun's column merely reported his view, as an observer of the initial fight, that such a man ought not be allowed to teach young students.

public debate about important local issues, I respectfully dissent.